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United Nations Commission on International Trade Law
Working Group III (Investor-State Dispute Settlement Reform)
Thirty-fifth session
New York, 23–27 April 2018

Possible reform of Investor-State dispute settlement (ISDS)

Comments by the Government of Thailand

Note by the Secretariat

In preparation for the thirty-fifth session of the Working Group, the Government of Thailand submitted to the Secretariat comments regarding procedural concerns regarding ISDS. The English version of the comments was submitted to the Secretariat on 11 April 2018. The text received by the Secretariat is reproduced as an annex to this note in the form in which it was received.

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Annex

Procedural Concerns Regarding Investor-State Dispute Settlement: Thailand's Perspective

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1. Introduction

1. This paper aims to identify procedural concerns regarding ISDS from the perspective of a developing country, both as a recipient of foreign direct investment and as a capital exporter. It is without prejudice to Thailand's position that discussions on ISDS reform should focus not only on procedural but also substantive matters, taking into account the substantive divergences among international investment agreements (IIAs).

2. The paper first reiterates the general principles that should guide the Working Group's discussion on ISDS reform (section 2). It then identifies and explains procedural concerns regarding ISDS that warrant detailed elaboration by the Working Group (section 3). The last section (section 4) discusses the relevance of inter-institutional cooperation and capacity-building initiatives for the Working Group's discussions on ISDS reform.

2. Guiding principles for discussions

3. With the objective of promoting a reform that is legitimate, viable, sustainable, and beneficial to all, an important principle that should guide the Working Group's discussions on ISDS is inclusiveness. Both members and non-members of UNCITRAL must be able to participate fully regardless of their level of development to ensure that all concerns raised are considered in the process.

4. Discussions on ISDS reform should be holistic and balanced, taking into account the different priorities of each State including: (a) the pursuit of public policy objectives of host States; (b) the promotion of responsible investment; (c) the protection of investors' rights; and (d) the attainment of global objectives such as sustainable development and food security.

5. Discussions on ISDS reform should also be thorough and not limited to just one aspect of ISDS — that is, arbitration. Focusing discussions on arbitration as a way to resolve investment disputes could deprive the Working Group of innovative solutions to the current problems. Instead, the Working Group should allow for discussions on other aspects of ISDS, in particular alternative dispute settlement mechanisms that may be used during the pre-arbitral stage and in parallel with the arbitration.

3. Concerns regarding ISDS procedures

3.1 The large amount of time and cost required in the arbitral proceedings

3.1.1 Ineffective use of alternative dispute resolution mechanisms during the pre-arbitral phase — a missed opportunity to reduce gaps between opposing positions?

6. Developing countries in a dispute are not always familiar with alternative dispute resolution (ADR) mechanisms and their potential to be used at the pre-arbitral phase. In many IIAs, only the consultation process is expressly provided for as a means to reach a mutually acceptable solution. In other cases, the IIAs are silent on the use of ADR mechanisms altogether.

7. Pre-arbitral proceedings, including good offices, mediation and conciliation, can help claimants and host States clarify each other's positions, and reduce the gap between the parties. In this respect, such mechanisms can facilitate the resolution of disputes through constructive dialogue. The involvement of third-party facilitators at an early stage should also be encouraged and widely used to assist the disputing

parties in arriving at a mutually agreed solution, thus reducing time and cost spent for the entire process. However, if the third-party facilitators participate too late in the process, one of the parties may deem such intervention unnecessary and a possible delay tactic from the other side.

8. A discussion on a possible guideline aimed at promoting an increasing interaction between professionals involved in the pre-arbitral phase through ADR mechanisms and arbitrators engaged during the arbitral proceedings would be useful.

3.1.2 Long "battle" during the enforcement phase of awards — another hidden aspect of costly and lengthy arbitration process

9. For the non-ICSID Member States which decide not to recognize and enforce the award rendered by the arbitral tribunal, they may request annulment of such award following the rules under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Such enforcement process usually involves a large amount of time and financial resources. In some complex cases, it may take longer time than the arbitration phase itself. From the perspective of a developing country with limited resources, any ISDS reform should therefore focus on promoting clarity and efficiency at the enforcement stage.

3.2 Arbitrators and their conduct

10. Another concern in ISDS is related to arbitrators' possible pre-existing bias due to their repeated appointments on one side of the dispute, and situations of "double-hatting" where the same persons are appointed as counsel and arbitrators in similar disputes. Such situations can bring about conflicts of interests in positions, and undermine the impartiality of arbitrators.

11. In addition, leading arbitrators are usually engaged in a large number of ongoing cases, giving them insufficient time to conduct a comprehensive analysis of issues at stake.

12. Another procedural concern results from specific requirements of arbitrators, which could generate extra burdens for developing countries. Arbitrators usually have predominance over the States regarding the establishment of rules of procedure and additional procedural arrangements, which can incur unexpected costs and time.

13. Inconsistent and incoherent views of arbitrators produce inconsistent and incoherent arbitration awards. Within the context of striking a proper balance between the preservation of host State's policy space and the safeguarding of investors' rights, any future reform should aim at ensuring consistent awards by ensuring that States secure the position of "master of treaties" through, inter alia, a joint interpretation mechanism, and do not become "slave of their own treaties" through an arbitration process. In parallel, the Working Group should consider carefully the idea of adding a new layer to the current ISDS system, be it an internationally composed entity or an appellate review mechanism of awards, and avoiding unnecessary new ISDS institutions.

14. To address these concerns, a code of conduct on ethics of arbitrators could be considered, containing, inter alia, clear provisions on permissible external activities and ways of implementing the joint interpretation mechanism.

3.3 External counsel and their professionalism

15. Developing countries often lack experience in ISDS cases and do not have in-house lawyers specialized in ISDS. They consequently have to rely heavily on legal services provided by external counsel. Since well-established external counsel are also often from a limited pool and are preoccupied with many concurrent cases, it is often the case that there can only be limited resources granted to each one.

16. There are international law firms specializing in ISDS that do not have a lot of experience working with developing countries. Therefore, they are not necessarily

familiar with developing countries' procedures, mindset and methodology of work. Such a situation leads to a range of problems from the law firms not being able to present what developing countries need at the initial interview to the law firms not being able to draft the terms of the employment contract that would suit the particular requirement of the State. The most immediate concerns of developing countries regarding external counsel are the cost of the arbitral proceedings, dealing with the arbitration procedures and their lack of flexibility in certain circumstances. International law firms and administering authorities need to recognize the limited resources of developing countries.

3.4 Unpreparedness of host States in ISDS cases

17. Developing countries generally lack the expertise on ISDS arbitration issues. As a consequence, they usually find themselves unprepared when ISDS disputes arise. This problem is compounded by the fact that there is usually no internal channel of communication available, leading to an inefficient coordination among relevant national agencies. This consequently prevents developing countries from effectively administering the disputes. In addition, respondent States are regularly facing tight schedules, especially when preparing their submissions. This puts them at a disadvantage compared to the claimants that usually have much more time to prepare. This situation is exacerbated by the fact that some of the existing arbitration rules, such as the UNCITRAL Arbitration Rules 1976, do not provide the respondent State with the opportunity to challenge the schedule established by the arbitral tribunal.

18. In an ISDS case, developing countries may also face unforeseen situations, where the claimants are financed by third-party funders. Although third-party funding may facilitate access to justice and improve security for costs in the arbitral proceedings, it raises concerns regarding conflicts of interest where, for example, counsel for a funded case is also an arbitrator in another case with the same funder. This could affect the arbitrators' impartiality, endangering the legitimacy of the arbitral proceedings. An appropriate regulation of third-party funding can help minimize its unintended consequences, while maximizing its benefits such as the allocation of costs and the security for costs.

3.5 Limited access to legal service at a reasonable cost

19. At present, there is no international body, which specializes in providing independent, low-cost legal advice on ISDS to developing countries — a body similar to the Advisory Centre on WTO Law (ACWL), which provides low-cost legal services on WTO law. Many developing countries thus have to endure the relatively high cost of legal services provided by international law firms, many of which may not even have adequate experience and expertise in handling ISDS cases. Indeed, defending ISDS cases requires a huge amount of developing countries' resources, both human and financial — resources, which could have been more usefully spent on meeting their developmental needs.

20. In this light, the establishment of an independent advisory entity, which caters for developing countries' particularities and specific needs, might be useful. Such an entity might take the form of an investment dispute advisory centre, which is separate from the proposed establishment of the International Tribunal for Investment. It should be independent, internationally funded, and composed of lawyers representing geographical diversity and would specialize in providing low-cost legal advice on international investment law to developing countries. Its operation should be expeditious and generate as little transaction costs as possible.

21. Such an entity could help ensure that developing countries are able to defend themselves adequately in ISDS cases, thus enhancing the expertise-based legitimacy of ISDS system.

4. Additional suggestions

4.1 Promote coordination among relevant international organizations

22. Many developing countries, including Thailand, have engaged in discussions on ISDS in many international forums besides UNCITRAL, including UNCTAD and OECD. Yet, these discussions have thus far yielded few concrete outcomes, in part due to the lack of sufficient coordination among the relevant forums. Without coordinated efforts, these piece-meal discussions on ISDS reform may lead to fragmented, inconsistent outcomes that are counter-productive to the global efforts at reforming ISDS.

23. To ensure concerted efforts among the different organizations, UNCITRAL should coordinate more closely with other organizations, both regional and international, which are engaging in discussions on ISDS reform including, inter alia, UNCTAD, ICSID and OECD. Such enhanced coordination will not only help avoid duplication of efforts among different organizations but also enrich and contextualize the discussions of the Working Group.

4.2 Provide capacity-building assistance to promote dispute prevention

24. Developing countries often lack knowledge and/or capacity to prevent conflicts from escalating to full-fledged arbitral proceedings. This makes them, as host States, vulnerable to claims from investors. Thus, any ISDS reform should go hand in hand with the promotion of dispute prevention policy. One such policy could be the improvement of investor-State communication through strengthening institutional arrangements between investors and the respective agencies.

25. From developing countries' perspective, the provision of capacity-building assistance should be deemed as a priority for reform purposes. Such assistance may be provided by relevant international organizations or by developed countries with expertise in the investment dispute management, and may take several forms, such as the organization of workshops or training sessions for the agencies concerned. These capacity-building exercises can help States develop effective and rational investment policies, thus avoiding the proliferation of ISDS cases.

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United Nations Commission on International Trade Law
Working Group III (Investor-State Dispute Settlement Reform)
Thirty-sixth session
Vienna, 29 October–2 November 2018

Annotated provisional agenda

I. Provisional agenda

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Possible reform of investor-State dispute settlement (ISDS).
5. Other business.
6. Adoption of the report.

II. Composition of the Working Group

1. The Working Group is composed of all States members of the Commission, which are the following: Argentina (2022), Armenia (2019), Australia (2022), Austria (2022), Belarus (2022), Brazil (2022), Bulgaria (2019), Burundi (2022), Cameroon (2019), Canada (2019), Chile (2022), China (2019), Colombia (2022), Côte d'Ivoire (2019), Czechia (2022), Denmark (2019), Ecuador (2019), El Salvador (2019), France (2019), Germany (2019), Greece (2019), Honduras (2019), Hungary (2019), India (2022), Indonesia (2019), Iran (Islamic Republic of) (2022), Israel (2022), Italy (2022), Japan (2019), Kenya (2022), Kuwait (2019), Lebanon (2022), Lesotho (2022), Liberia (2019), Libya (2022), Malaysia (2019), Mauritania (2019), Mauritius (2022), Mexico (2019), Namibia (2019), Nigeria (2022), Pakistan (2022), Panama (2019), Philippines (2022), Poland (2022), Republic of Korea (2019), Romania (2022), Russian Federation (2019), Sierra Leone (2019), Singapore (2019), Spain (2022), Sri Lanka (2022), Switzerland (2019), Thailand (2022), Turkey (2022), Uganda (2022), United Kingdom of Great Britain and Northern Ireland (2019), United States of America (2022), Venezuela (Bolivarian Republic of) (2022) and Zambia (2019).

2. States not members of the Commission and international governmental organizations may attend the session as observers and participate in the deliberations. In addition, invited international non-governmental organizations may attend the session as observers and represent the views of their organizations on matters where

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the organization concerned has expertise or international experience so as to facilitate the deliberations at the session.

III. Annotations to agenda items

Item 1. Opening of the session

3. The thirty-sixth session of the Working Group will be held at the Vienna International Centre, from 29 October to 2 November 2018. Meeting hours will be from 9.30 a.m. to 12.30 p.m. and from 2 to 5 p.m., except on Monday, 29 October 2018, when the session will be opened at 10 a.m.

Item 2. Election of officers

4. In accordance with its practice at previous sessions, the Working Group may wish to elect a Chairman and a Rapporteur.

Item 4. Possible reform of investor-State dispute settlement (ISDS)

(a) Previous deliberations

5. At its fiftieth session, the Commission had before it Notes by the Secretariat on Possible future work in the field of dispute settlement: Concurrent proceedings in international arbitration (A/CN.9/915); on Possible future work in the field of dispute settlement: Ethics in international arbitration (A/CN.9/916); and on Possible future work in the field of dispute settlement: Reforms of investor-State dispute settlement (ISDS) (A/CN.9/917). Also, before it was a compilation of comments by States and international organizations on Investor-State Dispute Settlement Framework (A/CN.9/918 and addenda).

6. Having considered the topics in documents A/CN.9/915, A/CN.9/916 and A/CN.9/917, the Commission entrusted Working Group III with a broad mandate to work on the possible reform of investor-State dispute settlement (ISDS). In line with the UNCITRAL process, Working Group III would, in discharging that mandate, ensure that the deliberations, while benefiting from the widest possible breadth of available expertise from all stakeholders, would be government-led with high-level input from all governments, consensus-based and be fully transparent. The Working Group would proceed to: (i) identify and consider concerns regarding ISDS; (ii) consider whether reform was desirable in light of any identified concerns; and (iii) if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission. The Commission agreed that broad discretion should be left to the Working Group in discharging its mandate, and that any solutions devised would be designed taking into account the ongoing work of relevant international organizations and with a view of allowing each State the choice of whether and to what extent it wishes to adopt the relevant solution(s).[1]

7. The Commission has also decided to retain two related topics in the field of investment arbitration on its agenda for further consideration: possible future work on concurrent proceedings and on ethics for arbitrators.[2] The Commission may consider whether to mandate a working group to undertake work in either or both of them at a future time.[3]

8. At its thirty-fourth session, the Working Group commenced work on consideration of possible reform of ISDS on the basis of a Note by the Secretariat (A/CN.9/WG.III/WP.142) and submissions from International Intergovernmental Organizations (A/CN.9/WG.III/WP.143). The deliberations and decisions of the

[1] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), para. 264.

[2] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), paras. 175–186.

[3] Ibid., para. 195.

Working Group with respect to certain issues (including procedural aspects of the arbitral process, outcomes, and transparency) are set out in documents A/CN.9/930/Rev.1 and A/CN.9/930/Add.1/Rev.1.

9. At its thirty-fifth session, the Working Group continued its deliberations on consideration of possible reform of ISDS on the basis of the above-referenced Note by the Secretariat (A/CN.9/WG.III/WP.142) as well as (a) submissions from International Intergovernmental Organizations (A/CN.9/WG.III/WP.143); (b) submissions from the European Union (A/CN.9/WG.III/WP.145); (c) submissions from International Intergovernmental Organizations and additional information: appointment of arbitrators (A/CN.9/WG.III/WP.146); and (d) comments by the Government of Thailand (A/CN.9/WG.III/WP.147). The deliberations and decisions of the Working Group with respect to certain issues (including outcomes of the arbitral process, and arbitrators and decision-makers) are set out in document A/CN.9/935.

10. Taking note of the progress made by the Working Group, the Commission, at its fifty-first session, expressed its satisfaction with the progress made and the support provided by the Secretariat. The Commission noted that the Working Group would continue its deliberations pursuant to the mandate given to it, allowing sufficient time for all States to express their views, but without unnecessary delay.[4]

11. In that context, the Commission expressed its appreciation for the contributions to the UNCITRAL Trust Fund from the European Union and the Swiss Agency for Development and Cooperation, aimed at allowing participation of developing States in the deliberations of the Working Group, and ongoing efforts by the Secretariat to secure additional voluntary contributions. The Commission also welcomed the outreach activities of the Secretariat aimed at raising awareness about the work of the Working Group, and ensuring that the process would remain inclusive and fully transparent. The Commission further expressed its appreciation for the provision of information to assist the Working Group in its deliberations from various stakeholders, as well as for proposals by an Academic Forum and a Group of Practitioners to make information from their research and experience available to the Working Group. Lastly, the Commission welcomed the invitation of the Republic of Korea to an intersessional regional meeting on ISDS reform, to be held in Incheon, Republic of Korea, on 10 and 11 September 2018.[5]

(b) Documentation

12. At its thirty-sixth session, the Working Group is expected to continue its consideration of possible reform of ISDS based on the following documents:

- Document A/CN.9/WG.III/WP.149, which sets out the concerns discussed in the Working Group and a framework for its future discussion;
- Documents A/CN.9/WG.III/WP.150-152, which respectively provide additional information on (i) consistency, including coherence, predictability and correctness of the outcome of ISDS, (ii) arbitrators and decision-makers, and (iii) costs and duration;
- Document A/CN.9/WG.III/WP.153, a note submitted jointly by the secretariats of UNCITRAL and ICSID on elements of a code of ethics for arbitrators/adjudicators; and
- Document A/CN.9/WG.III/WP.154, a report of the first intersessional regional meeting on ISDS reform, held in Incheon, Republic of Korea, on 10 and 11 September 2018.

13. Should further submissions be received from States or International Intergovernmental Organizations, they will be made available on the UNCITRAL

[4] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), para. 145.

[5] Ibid., paras. 142–144 and 146.

webpage for Working Group III (http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html).

14. A limited number of the following background documents will be made available at the session:

- Reports of the United Nations Commission on International Trade Law on the work of its forty-eighth session (*Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17)); forty-ninth session (*Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17)); fiftieth session (*Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17)); and fifty-first session (*Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17));
- Note by the Secretariat on possible reform of ISDS (A/CN.9/WG.III/WP.142) as well as submissions from International Intergovernmental Organizations (A/CN.9/WG.III/WP.143 and A/CN.9/WG.III/WP.146), from the European Union (A/CN.9/WG.III/WP.145); and comments by the Government of Thailand (A/CN.9/WG.III/WP.147);
- Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session Part I (A/CN.9/930/Rev.1) and Part II (A/CN.9/930/Add.1/Rev.1); and
- Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (A/CN.9/935).

15. UNCITRAL documents are posted on the UNCITRAL website (www.uncitral.org) upon their issuance in all the official languages of the United Nations. Delegates may wish to check the availability of the documents by accessing the Working Group's page in the "Working Groups" section of the UNCITRAL website.

Item 5. Adoption of the report

16. The Working Group may wish to adopt, at the close of its session, a report for submission to the fifty-second session of the Commission, scheduled to be held in Vienna, from 8 to 26 July 2019. The main conclusions reached by the Working Group at its ninth meeting (on Friday morning) will be summarily read out for the record at the tenth meeting (on Friday afternoon) and subsequently incorporated into the report.

IV. Scheduling of meetings

17. The thirty-fifth session of the Working Group will last for five working days. There will be ten half-day meetings available for consideration of the agenda items. The Working Group may wish to note that, consistent with decisions taken by the Commission at its thirty-fourth session,[6] the Working Group is expected to hold substantive deliberations during the first nine half-day meetings (that is, from Monday to Friday morning), with a draft report on the entire period being prepared by the Secretariat for adoption at the tenth and last meeting of the Working Group (on Friday afternoon).

18. The Working Group may wish to note that its thirty-seventh session is scheduled to be held in New York, from 1 to 5 April 2019.

[6] Ibid., *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 381.

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Possible reform of investor-State dispute settlement (ISDS)

Note by the Secretariat

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I. Introduction

1. At its thirty-fifth session, the Working Group requested the Secretariat to prepare a list of the concerns about investor-State dispute settlement (ISDS) raised during its thirty-fourth and thirty-fifth sessions and to set out a possible framework for its deliberations. The Working Group also requested the Secretariat to consider the provision of further information to assist States with respect to the scope of some of its concerns regarding ISDS (A/CN.9/935, para. 100).

2. This Note sets out some main concerns about ISDS raised in the Working Group during its thirty-fourth and thirty-fifth sessions and is supplemented by more detailed discussion of each topic in background reference documents A/CN.9/WG.III/WP.150 to A/CN.9/WG.III/WP.153.[1] This Note also contains a suggested framework for considering the question of desirability of reforms. The topics discussed in the background documents are not intended to reflect a comprehensive set of issues regarding ISDS that the Working Group has discussed, or may yet wish to discuss. Additional concerns may have to be addressed.

3. As is the case for other documents provided to the Working Group, this Note was prepared with reference to a broad range of published information on the topic,[2] and does not seek to express a view on the desirability of reforms, which is a matter for the Working Group to consider.

II. List of concerns about ISDS

A. General remarks

1. Characteristics of the ISDS regime under consideration

4. The international investment regime includes over 3,000 international investment treaties concluded over the last fifty years.[3] These treaties, which are instruments of public international law, were conceived as a means to enhance confidence in the stability of the investment environment. To do so, they provide substantive guarantees to foreign investors and their investments in the form of enforceable obligations placed upon States. For example, in these treaties, States undertake to respect certain standards of investment protection (such as fair and equitable treatment, full protection and security, protection from expropriation, freedom to repatriate funds and non-discrimination in the treatment of the investment).

5. The ISDS regime was developed to allow a foreign investor (whether a natural or legal person) to bring a claim directly against the sovereign State in which it was an investor. The regime provided a significant break from traditional mechanisms under international law, which essentially relied on diplomatic protection or "espousal" by the home State of the investors' claim to resolve disputes relating to investment.

6. While ISDS provisions in investment treaties vary, they generally provide for dispute settlement through arbitration, and include the following features: (i) the claimant-investor may bring a claim directly against the host State; (ii) the dispute is resolved by an arbitral tribunal constituted ad hoc for that particular dispute; and

[1] The Working Group may wish to note that issues regarding the practice of third-party funding will be addressed in a separate Note by the Secretariat, to be issued at a later stage.

[2] See bibliographic references published by the Academic Forum, available under "Additional resources" at http://www.uncitral.org/uncitral/en/publications/online_resources_ISDS.html).

[3] The term "investment treaty" in this Note covers broadly any bilateral or multilateral treaty that contains provisions on the protection of investments or investors and ISDS, including any treaty commonly referred to as a free trade agreement, economic integration agreement, or trade and investment framework or cooperation agreement.

(iii) both disputing parties, including the claimant-investor and the respondent-State, play an important role in the selection of the arbitral tribunal.[4]

2. Observations on information and data

7. At its thirty-fourth and thirty-fifth sessions, the Working Group noted the importance of a factual underpinning of its deliberations (A/CN.9/930/Rev.1, para. 42; A/CN.9/935, para. 46). Efforts to increase transparency in ISDS have contributed to make more information publicly available not only with regard to its outcomes but also to its procedures. A more comprehensive data pool is available for cases administered by the International Centre for Settlement of Investment Disputes (ICSID), which are considered to represent 75 per cent of investment treaty cases.[5] This Note and the supporting reference documents (A/CN.9/WG.III/WP.150 to A/CN.9/WG.III/WP.153) therefore discuss, where available and appropriate, the statistical context of data on ISDS outcomes and procedures.

B. Concerns identified in the Working Group

8. This section provides an annotated list of the main concerns raised at the thirty-fourth and thirty-fifth sessions of the Working Group. They are grouped into three main topics (consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals; arbitrators/decision makers; and costs and duration), discussed in detail in documents A/CN.9/WG.III/WP.150 to A/CN.9/WG.III/WP.153, respectively. Within those groups, the concerns are further broken down into related elements, for ease of presentation.

1. Concerns pertaining to consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals

9. Concerns expressed regarding the lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals, which are addressed in detail in document A/CN.9/WG.III/WP.150, relate to the following matters:

- Divergent interpretations of substantive standards; divergent interpretations relating to jurisdiction and admissibility; and procedural inconsistency (A/CN.9/WG.III/WP.150, paras. 14–18);
- Lack of a framework to address multiple proceedings (A/CN.9/915); and
- Limits of the current mechanisms to address inconsistency and incorrectness of decisions (A/CN.9/WG.III/WP.150, paras. 19–26).

10. Regarding the latter point, the Working Group may wish to note that the existing review mechanisms (ICSID annulment procedure, as well as setting aside of awards, and recognition and enforcement proceedings by State courts) address the integrity and fairness of the process rather than the consistency, coherence or correctness of the outcomes (A/CN.9/WG.III/WP.142, para. 39 and A/CN.9/935, para. 23). Because of the notion of finality, remedies against awards are by nature limited.

2. Concerns pertaining to arbitrators and decision makers

11. At its thirty-fifth session, the Working Group approached its consideration of arbitrators and decision makers from two main perspectives: first, whether the existing ISDS regime offers a sufficient guarantee of an independent and impartial tribunal, and secondly, whether the existing approaches to the constitution of tribunals ensure that the tribunal members have the appropriate qualifications and characteristics to decide the cases before them (A/CN.9/935, paras. 45–92).

[4] See A/CN.9/WG.III/WP.142, paras. 5–7.

[5] See ICSID published information on caseload and statistics, available at https://icsid.worldbank.org/en/Pages/resources/ICSID-Caseload-Statistics.aspx.

Documents A/CN.9/WG.III/WP.151 and A/CN.9/WG.III/WP.152 address these questions in detail.

12. The concerns expressed in the Working Group regarding the independence and impartiality of arbitrators and decision makers relate to the following matters:

- The standards of independence and impartiality required of individual arbitrators, and the observation that those standards might be insufficiently clear in scope and homogeneous in practical application (A/CN.9/WG.III/WP.151, paras. 42–47);
- The existence of issue conflicts such as double hatting and prejudgment of issues (A/CN.9/WG.III/WP.151, paras. 24–38); and
- The challenge mechanism (that is, an application to disqualify an arbitrator on the basis of an actual or perceived lack of independence and impartiality), and its limitations (A/CN.9/WG.III/WP.151, paras. 48–66).

13. The concerns expressed regarding the existing approaches to the constitution of tribunals, and the impact of those approaches on the qualifications and characteristics of tribunal members, relate to the following matters:

- The use of a party-appointment mechanism in cases involving a State, and its limitations including as regards ensuring competence and qualifications of arbitrators (A/CN.9/WG.III/WP.152, paras. 7 and 30–36);
- The impact of party remuneration, dissenting opinions and repeat appointments of certain arbitrators on the perception of arbitrator bias (A/CN.9/WG.III/WP.152, paras. 39–41);
- The limited number of individuals repeatedly appointed as arbitrators (A/CN.9/WG.III/WP.152, para. 18) and the possible impact on cost and duration of proceedings (A/CN.9/WG.III/WP.152, paras. 19–29); and
- The lack of diversity in terms of gender, age, ethnicity and geographical distribution of appointed arbitrators, so that professional background of arbitrators, differing legal systems and levels of economic development are not all proportionately represented in tribunals (A/CN.9/WG.III/WP.152, para. 18).

3. Concerns pertaining to cost and duration of ISDS cases

14. At its thirty-fourth session, the Working Group undertook a preliminary discussion on cost and duration of ISDS under the general topic of procedural aspects of the arbitral process (A/CN.9/930/Rev.1, paras. 35–78). States and intergovernmental organizations shared their experiences in connection with ISDS. It was said that deliberations relating to cost and duration should be fact-based, but that perceptions on those issues had an influence on the legitimacy of the ISDS regime (A/CN.9/WG.III/WP.153, paras. 10, and 38–65).

15. The concerns expressed in the Working Group relating to cost and duration relate to the following matters:

- Lengthy and costly ISDS proceedings (A/CN.9/WG.III/WP.153, paras. 7–9, 17–27 and 42–59);
- Allocation of costs by arbitral tribunals in ISDS (A/CN.9/WG.III/WP.153, paras. 14, 28–32 and 60–65);
- Difficulties faced by successful States being unable to recover some or all of their costs from claimant investors and the need for rules on security of costs (A/CN.9/WG.III/WP.153, paras. 15 and 33–37); and
- Lack of a mechanism to address frivolous or unmeritorious claims (A/CN.9/WG.III/WP.153, paras. 33 and 86).

16. During its deliberations, the Working Group identified a number of elements having an impact on cost and duration of ISDS proceedings: complexities of the case,

the underlying treaties and the proceeding; large volume of evidence; quality of factual records; conduct of the proceedings and ineffective case management (including lengthy deliberations and excessive numbers of hearings); and the need to translate documents and evidence into the language(s) of the arbitration. In addition, the Working Group noted that the most time-consuming stages of ISDS proceedings included the appointment of the tribunal members, discovery or document production, and the issuance of awards (A/CN.9/WG.III/WP.153, paras. 76–92).

4. Other concerns

17. At the thirty-fifth session of the Working Group, it was emphasized that States would have the opportunity to raise additional concerns at future sessions of the Working Group (A/CN.9/935, para. 99). The Working Group may wish to consider whether other concerns pertaining to the ISDS regime, not identified above and in documents A/CN.9/WG.III/WP.150 to A/CN.9/WG.III/WP.153 would need further consideration.[6]

III. Framework for discussion

A. General remarks

18. The Working Group may wish to recall that its mandate contains three stages: (i) to identify and consider concerns regarding ISDS; (ii) to consider whether reform was desirable in light of any identified concerns; and (iii) if the Working Group were to conclude that reform was desirable, to develop any relevant solutions to be recommended to the Commission. In addition, the mandate focuses on the procedural aspects of dispute settlement rather than on the substantive provisions (A/CN.9/930, para. 20).

19. The Working Group may wish to proceed to consider whether reform is desirable in light of (i) the concerns set out above, and any other concerns it may wish to identify; as well as (ii) the available options of reforms. The options for reform outlined below and in the annex to this document are based on preliminary options identified in the Working Group at its thirty-fourth and thirty-fifth sessions. They are not exhaustive, and the Working Group may wish to consider any further options that could be developed.

20. The Working Group may wish to note that the suggested framework (see paras. 26–70 below) and the tabular presentation of the framework annexed to this document include a list of possible options for reform in light of identified concerns so as to enable the Working Group to consider the desirability of reform. The chart also contains a brief outline of the main possible impact of the reform options on the existing ISDS regime in order to allow the Working Group, should it so wish, also to consider the feasibility of reforms. The suggested framework for discussion does not seek to express a view on the desirability or feasibility of reforms, which are matters for the Working Group to consider.

21. As regards the rationale and desirability for reform of the current ISDS regime, the Working Group may wish to consider the policy objectives that the regime seeks to achieve. In that context, the Working Group may wish to consider the policy objectives of the ISDS regime and of possible reform in light of the 2030 Agenda for the Sustainable Development Goals.[7] It may also wish to note the consideration expressed by States that (i) investment policies should provide legal certainty and

[6] In this regard, the Working Group may wish also to take into consideration the issues raised in papers and statements submitted for its consideration at its thirty-fourth and thirty-fifth sessions (available at http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html), and the materials available at the link entitled "Investor-State Dispute Settlement Reform: On-line Resources".

[7] See General Assembly resolution 70/1 of 25 September 2015, *Transforming our world: the 2030 Agenda for sustainable Development*.

strong protection to investors and investments, tangible and intangible, (ii) access to effective mechanisms for the prevention and settlement of disputes, as well as to enforcement procedures, and (iii) dispute settlement procedures should be fair, open and transparent, with appropriate safeguards to prevent abuse.[8]

22. The Working Group may also wish to consider the guiding principles for any reform. It may wish to recall that, at its thirty-fifth session, the need for any ISDS reform to strike a balance between rights and obligations of the States on the one hand and of the investors on the other was stressed (A/CN.9/935, para. 14). Efficiency, flexibility and cost-effectiveness were mentioned as the guiding principles when considering any reform (A/CN.9/935, para. 43).

23. The Working Group may also wish to consider the objectives for reform and main principles identified by UNCTAD, to (i) enhance the legitimacy of the ISDS system, (ii) enhance the contracting parties' control over the interpretation of their treaties, and/or (iii) streamline the process and make it more efficient.[9]

24. As regards the various identified issues, the Working Group may wish to consider that they all constitute elements of an overall regime. At its thirty-fifth session, the Working Group heard suggestions that it would be necessary to strike the right balance between different concerns, and to consider thoroughly the impact of inconsistency on core treaty provisions, and on costs and duration. It was added that other concerns and issues, such as lack of transparency, lack of effective mechanism to address frivolous claims and issues of third-party funding, should be considered as they also had an impact on the overall functioning of ISDS (A/CN.9/935, para. 44). Attention was drawn to the need to consider the issues of duration and costs in the broader context of (a) innovations in arbitration rules and investment treaties (such as early dismissal of frivolous, unmeritorious claims, preliminary objections, security for costs); (b) the need to ensure correctness of decisions; and (c) enhancing the predictability of decisions. It was added that a comprehensive analysis would require nuanced and not merely simple solutions (A/CN.9/930/Rev.1, para. 59).

25. The suggested framework for consideration of the desirability of reform is based on consideration of issues and possible solutions by the Working Group, suggestions for reform by States, as well as the road map for reform proposed by UNCTAD[10] and the OECD scoping paper.[11] The proposals for amendments articulated by the ICSID Secretariat[12] are also mentioned where relevant. The Working Group may wish to note that there are a number of options, that can be undertaken in isolation or in combination. The presentation of options below is preliminary and consequently it does not provide an analysis of each option, nor of what each one of them would entail individually and in relation to the current regime.

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[8] See Guiding Principle III — G20 Guiding Principles for Global Investment Policymaking (Annex III), G20 Trade Ministers Meeting Statement 9–10 July 2016, Shanghai, The Sustainable Development Goals. See also UNCTAD, World Investment Report 2017, available at http://unctad.org/en/PublicationChapters/wir2017ch3_en.pdf.

[9] UNCTAD, World Investment Report 2015, Chapter IV, p. 148, available at https://unctad.org/en/PublicationChapters/wir2015ch4_en.pdf.

[10] UNCTAD World Investment Report 2015, Chapter IV, p. 165, available at https://unctad.org/en/PublicationChapters/wir2015ch4_en.pdf.

[11] See A/CN.9/918/Add.7, OECD comments, see also Gaukrodger, D. and K. Gordon (2012), *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment, 2012/03, OECD Publishing. http://dx.doi.org/10.1787/5k46b1r85j6f-en.

[12] See ICSID Secretariat, Proposals for Amendment of ICSID Rules — Working Paper, August 2, 2018, available at https://icsid.worldbank.org/en/Documents/Amendments_Vol_Three.pdf.

B. Suggested framework for discussion

1. Inconsistency and related matters

26. At the thirty-fourth session of the Working Group, it was indicated that criticism of a lack of consistency and coherence was one of the reasons behind the Commission's decision to embark on work on possible ISDS reform, thereby acknowledging the importance of ensuring a coherent and consistent ISDS regime. It was said that consistency and coherence would support the rule of law, enhance confidence in the stability of the investment environment and further bring legitimacy to the regime. It was also said that inconsistency and lack of coherence, on the other hand, could negatively affect the reliability, effectiveness and predictability of the ISDS regime and its credibility (A/CN.9/930/Add.1/Rev.1, para. 11).

27. The Working Group may wish to consider the questions raised in document A/CN.9/WG.III/WP.150, paras. 28–31, as well as preliminary views expressed by States (see A/CN.9/WG.III/WP.150, paras. 32–36). It may also wish to note the challenge of designing a framework that strikes a careful balance between conflicting demands: on the one hand, the need for an efficient and final dispute settlement mechanism and, on the other, the concern to protect the integrity of the process and the correctness of the decision-making.

28. Possible options for reform to address these concerns would include the following (see also A/CN.9/WG.III/WP.150, paras. 37–47).

(a) Enhancing contracting States' control over their instruments

29. The Working Group may wish to consider as an option for reform tools that would reserve a wider role to States for the interpretation of their investment treaties. A number of provisions found in recent treaties aim at increasing the role of States in various manners, such as by providing for the possibility of joint interpretations, binding on arbitral tribunals, as well as other mechanisms to revise, amend or update investment treaties.[13]

30. In order to make such treaty provisions effective, or to encourage joint interpretation by treaty Parties more generally, this option could entail designing a mechanism at a multilateral level, fostering the use of interpretative tools. The Working Group may wish to consider the study carried out by the OECD on the matter,[14] where it concludes that "with an increasing number of investment treaties covering relationships where governments have more complex and more overlapping interests, joint interpretive agreements are likely to be an increasingly important tool for ensuring that treaties are interpreted in accordance with the treaty parties' intent and achieve their purposes."[15]

(b) Strengthening the involvement of State authorities for preliminary settlement of disputes

31. Recent treaties include provisions aimed at circumscribing investors' access to ISDS (for instance, excluding from the scope of ISDS claims that relate to sensitive

[13] See, for instance, Treaty between the United States of America and the Oriental Republic of Uruguay concerning the Encouragement and Reciprocal Protection of Investments (2005).

[14] See Gaukrodger, D. (2016), *The legal framework applicable to joint interpretive agreements of investment treaties*, OECD Working Papers on International Investment, 2016/01, OECD Publishing, Paris, available at http://dx.doi.org/10.1787/5jm3xgt6f29w-en; see also Gordon, K. and J. Pohl (2015), *Investment Treaties over Time — Treaty Practice and Interpretation in a Changing World*, OECD Working Papers on International Investment, 2015/02, OECD Publishing. http://dx.doi.org/10.1787/5js7rhd8sq7h-en.

[15] The OECD studies list various tools available to Governments to influence their positioning in the international investment law system, they include in addition to joint interpretations, unilateral instruments clarifying the meaning of treaty provisions and parties' intent, pleadings filed by the respondent governments and submissions by the non-disputing treaty Party, consultation mechanisms.

policy areas, relating to technical issues such as taxation, or arising from contractual obligations, thereby limiting arbitrable claims). They also include mechanisms for channelling sensitive or technical issues to State-to-State dispute settlement.

32. In that light, an option for reform could aim at designing a mechanism that would allow technical authorities established by treaty Parties to decide whether a claim falls outside the limited scope of claims that are subject to ISDS, as well as substantive matters such as questions relating to violations of national treatment and substantive MFN clauses. This option could entail the development of models for setting up a joint review committee by the treaty Parties together with a review mechanism or State-State appeal body to apply after a given time period, if the claim cannot be settled at the technical level.[16] Such mechanisms may also constitute a means to deal with frivolous or unmeritorious claims.

(c) Guidance to arbitral tribunals, claims commissions

33. There are a number of procedural mechanisms that arbitral tribunals could resort to or be encouraged to use in order to coordinate better their decision-making, including in situations of concurrent proceedings. These tools are described in document A/CN.9/915, paras. 10–33. They are meant to address mainly two categories of situations. The first category is where different entities within the same corporate structure have a right of action against a State or State-owned entity in relation to the same investment, with regard to the same State measure and for the benefit of substantially the same interests, as long as all entities qualify as investors under an applicable investment treaty, or have a right of action under a contract or under domestic investment law. The second category is where a measure by a State has an impact on a number of investors which are not related (see A/CN.9/881, paras. 7 and 8).

34. Various options are available to address these situations. Regarding the first category, solutions could include proactive use of consolidation, exchange of information among arbitral tribunals, stay of proceedings, as well as use of the doctrines of lis pendens and res judicata. Regarding the second category, available solutions could range from exchange of information among tribunals, involvement of an administering institution, and increased transparency, including in the conduct of the proceedings and the establishment of claims commissions to deal consistently with the numerous claims. A further option may include broadening the use of ISDS to cover class-actions. The Working Group may wish to note that it has been suggested that while such solutions could ensure consistency within a treaty or specific set of issues, they may not be sufficient to provide harmonization across treaties, if such harmonization is considered desirable.

(d) Introducing a system for prior scrutiny of awards

35. A system allowing for prior scrutiny of arbitral awards could also be considered. Scrutiny of awards is a feature of the Rules of the ICC International Court of Arbitration. That system has often been described as beneficial in that it is said to enhance the quality and thereby the enforceability of awards. A similar system could be designed to ensure consistency, avoid legal mistakes and ensure quality of awards rendered by ISDS tribunals.

(e) Introducing a system of binding precedent

36. From a historical viewpoint, consistency and coherence are not features built into the ISDS regime. Decisions are made by arbitral tribunals established on an ad hoc basis, with no formal obligation with regard to the principle of precedent. Currently, while tribunals seem to agree that there is no doctrine of binding precedent per se, they also concur on the need to consider earlier cases. Nonetheless, this has

[16] See, for instance, Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments (signed on 9 September 2012, in force since 1 October 2014).

not always secured consistency among arbitral awards as this approach is difficult to implement in a decentralized mode of decision-making, composed of ad hoc tribunals only.[17]

37. The Working Group may wish to consider that "consistency", "coherence", and "predictability" of decisions in ISDS could mean that decision makers take into account, as appropriate, relevant pre-existing case law and conform to the extent possible or desirable to the relevant legal interpretations set out therein. The Working Group may wish to consider whether, in a "coherent" and "predictable" system, conflicting decisions should be based upon a consistent interpretative approach to the issues at stake, extending beyond the instant case, and taking into account pre-existing case law in order to contribute to the development of investment law and jurisprudence.

38. The Working Group may wish to note that, despite being primarily responsible for rendering decisions on the matters submitted to them, arbitral tribunals also operate in the framework of a larger adjudicatory context with public relevance. Indeed, investment treaty tribunals are often noted as contributing to articulating and clarifying the meaning of core treaty standards.[18] Therefore, a related question the Working Group may wish to consider is whether arbitrators should be considered as being under a general duty towards an international system of justice, to act in the public interest (A/CN.9/935, paras. 85 and 86), and if so, how to implement such duty.

(f) Setting up a system of preliminary rulings

39. A "preliminary ruling" procedure means that a court may refer a decision on a specific issue arising in pending proceedings to a different court. The purpose of the procedure is to have a provision of law interpreted by the latter court. The proceedings before the court seeking the ruling are normally suspended pending the determination by the other court. The ruling will usually bind the court requesting it, which will then incorporate it into its overall resolution of the dispute before it.[19] An option for reform may include a system of preliminary ruling, allowing arbitral tribunals to refer any question concerning the application and interpretation of a legal matter to a specific body.

(g) Introducing an appellate mechanism

40. A possible reform option may consist in the development of an appellate review mechanism that would go beyond the current limited scope of review as part of an annulment process. The main functions of an appellate mechanism would be to ensure procedural and substantive correctness of decisions, and to increase predictability of treaty interpretation. It could be tasked with a substantive review of decisions and could permit implementation of a system of binding precedent.[20] The appellate mechanism could be tasked with a review of first instance decisions, arbitral awards as well as decisions of international commercial courts. This option could but would

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[17] By comparison, in the International Court of Justice, there is no de jure *stare decisis* (see Article 59 of the ICJ Statute), there is, however, a strong reliance on earlier judicial decisions, which are listed as "subsidiary means for the determination of rules of law" in Article 38 of the ICJ Statute.

[18] See *Glamis Gold Ltd. v. United States of America*, UNCITRAL Arbitration (NAFTA), Award, 8 June 2009, at para. 7, where the tribunal provided as follows: "this Tribunal, in undertaking its primary mandate of resolving this particular dispute, does so with an awareness of the context within which it operates. The Tribunal emphasizes that it in no way views its awareness of the context in which it operates as justifying (or indeed requiring) a departure from its duty to focus on the specific case before it. Rather it views its awareness of operating in this context as a discipline upon its reasoning that does not alter the Tribunal's decision, but rather guides and aids the Tribunal in simultaneously supporting the system of which it is only a temporary part." See also *Saipem S.p.A v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07.

[19] As an example of such procedure, see Article 267 of the Treaty on the Functioning of the European Union, whereby a court of a Member State of the European Union may, and in certain instances shall request the Court of Justice of the European Union (CJEU) to give a ruling on the interpretation of EU law.

[20] See also ICSID-Secretariat, Discussion Paper "Possible Improvements of the Framework for ICSID Arbitration (22 October 2004), available at https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents.

not necessarily require the establishment of a standing body. It may be noted that illustrations of appellate review mechanisms can be found in certain investment treaties.[21]

41. A matter that would nonetheless deserve consideration is the relationship between an appellate mechanism and the ICSID Convention, which excludes any appeal or other remedy, except for those provided for in the Convention itself (Article 53) (see A/CN.9/917, paras. 20–23). Similarly, the relation with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) would need to be considered.[22]

(h) Setting up an appellate body

42. A reform option could consist of the creation of a separate appellate body, which would result in the current ISDS regime maintaining most of its basic features, while being complemented with a standing or at least semi-permanent appellate body. The appellate body could function as a review mechanism for arbitral awards. An appellate body could also function as a second instance of a multilateral investment court if one were to be set up. Further, an appellate body could also function as a second instance to review decisions made by international commercial courts as established by several States. Lastly, it could also provide some degree of international review in claims of denial of justice by domestic courts. The creation of an appellate body is often cited as a possible response to demands for greater consistency in the decisions of ISDS tribunals, as well as legal correctness.

43. The Working Group may wish to note that despite the fact that most arbitration regimes emphasize the finality of the awards thus prohibiting appeals, there are nonetheless examples of institutional arbitration regimes that provide for appellate review of arbitral awards. Under some national arbitration laws, parties may agree on a two-level arbitration process, and there is no suggestion that the presence of an appeal makes the process different from arbitration. The questions mentioned in paragraph 41 above would need to be considered also in the context of the establishment of an appellate body.

(i) Setting-up an international court system

44. A reform option could include, as envisaged by certain recent investment treaties, the creation of a court, established as a permanent international institution.[23] The stated rationale is that by sitting permanently and deciding cases over time, judges could deliver consistent decisions. A court could be conceived as a first instance tribunal, with or without an appeal tribunal and be composed of judges, obliged to adhere to underlying ethical standards. The purposes usually mentioned regarding the establishment of an investment court are to address concerns regarding inconsistency and incorrectness of decisions made by ISDS tribunals, as well as concerns regarding ethical requirements and appointment mechanisms for arbitrators and decision makers.

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[21] See, for instance, the Treaty between the United States of America and the Oriental Republic of Uruguay concerning the Encouragement and Reciprocal Protection of Investment, 4 November 2005 (entry into force 1 November 2006), Annex E, the Free Trade Agreement between the Government of the Republic of Chile and the Government of the United States of America, 6 June 2003 (entry into force 1 January 2004), Art. 10.19 (10) and Annex 10-H, the Dominican Republic-Central America Free Trade Agreement, 5 August 2004, the Canada-European Union Comprehensive Economic and Trade Agreement (CETA), at article 8.28.

[22] See CIDS report, p. 54 and p. 68, available at http://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf.

[23] See for instance, the Canada-European Union Comprehensive Economic and Trade Agreement (CETA), the European Union-Viet Nam Free Trade Agreement.

2. Arbitrators and decision makers

45. Based on the concerns above and as set out in more detail in documents A/CN.9/WG.III/WP.151 and A/CN.9/WG.III/WP.152, the Working Group may wish to consider reform options as far as arbitrators and decision makers are concerned.

46. The Working Group may wish to note that ICSID has published a comprehensive set of proposed changes to modernize its rules for ISDS, which aims at addressing concerns identified to it. The proposals by the ICSID Secretariat include an enhanced declaration of independence and impartiality for arbitrators, and a new process for challenging arbitrators, including the introduction of an expedited schedule for parties filing a challenge.[24] In addition, it is proposed to remove automatic suspension of the proceedings when a challenge is filed, and to broaden the possible role of the Chairman, the President of the World Bank, in case of challenge.

47. The Working Group may wish to note some questions for consideration in documents A/CN.9/WG.III/WP.151, paras. 72–85 and A/CN.9/WG.III/WP.151, paras. 69–71 as well as preliminary views expressed by States (see A/CN.9/WG.III/WP.152, paras. 45–50 and A/CN.9/WG.III/WP.152, paras. 41–44). Possible options for reform to address concerns regarding arbitrators and decision makers would include the following.

(a) Code of conduct and other ethical requirements

48. The Working Group may wish to consider that the development of a code of conduct for arbitrators and adjudicators (A/CN.9/935, paras. 64 and 81) could aim at (i) ensuring that all stakeholders understand the thresholds for when independence and impartiality would be seen to be impaired (A/CN.9/935, para. 65); (ii) developing requirements for qualifications of arbitrators (A/CN.9/935, para. 65); (iii) providing clarity on arbitrators' roles and requirements regarding diversity or appropriate regional representation.

49. It may be noted that recently concluded investment treaties have included a code of conduct for arbitrators, in order to ensure respect of high ethical and professional standards. It may be noted that such codes define procedures to be followed in order to ensure that any situation with the potential to give rise to real or perceived conflicts of interest would be fully disclosed. Such codes also include concrete steps to determine whether a conflict of interest could arise or has arisen.

50. The Working Group may wish to consider the suggestion expressed at its thirty-fifth session that harmonization could result in a code of ethics for ISDS being developed through possible joint work between UNCITRAL and ICSID secretariats.

(b) Development of further rules and procedures for the challenge mechanism

51. The Working Group may wish to consider the option of developing further rules and procedures on challenge mechanisms, aimed at: (i) harmonizing challenge mechanisms, including timelines; (ii) clarifying who decides on challenge and how; (iii) clarifying the effect of the challenge procedure; (iv) introducing transparency requirements, reasoning requirements and publication of decisions on challenge; and (v) introducing sanctions for frivolous challenges, or non-compliance by arbitrators of the duty to disclose. The Working Group may also wish to consider the provision of additional soft law guidance on the use of rules and procedures for the challenge mechanism.

(c) Establishment of a control system for challenges

52. The Working Group may wish to consider whether a control system for challenges should be considered. Arbitral institutions, or ad hoc bodies could be tasked with a specified role, including with deciding on challenge procedures.

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[24] See ICSID Secretariat, Proposals for Amendment of ICSID Rules, footnote 12, supra.

(d) Appointments through alternative methods

53. A reform option could involve adjustment to the appointment process of arbitrators by the parties. For example, whether the parties could agree to refer to a pre-established group of arbitrators under article 37 of the ICSID Convention and its Additional Facility Rules and whether article 6 of the UNCITRAL Arbitration Rules and its system of designating and appointing authorities could allow for adjustments to the appointment process are elements for further consideration. The Working Group may also wish to consider different means of appointing arbitrators, including (i) the increased use of appointing authorities or the use of rosters; (ii) a greater role for arbitral institutions in the selection of arbitrators; (iii) a role in appointments to an independent body, or by a mechanism such as that available in other international courts and bodies (for instance, the WTO Dispute Settlement Body) (A/CN.9/935, para. 67).

54. Another possibility would consist of establishing a new mechanism for appointing arbitrators, which would come closer to a court system, in which the disputing parties do not choose the adjudicators.

55. Yet another possibility could be to depart completely from the adjudication by arbitrators and to submit the disputes to judges appointed according to procedures to be determined (see also para. 64 below).[25]

(e) Training, rosters, and certifications

56. The Working Group may wish to consider whether, in order to address the question of lack of diversity in ISDS, programmes could be developed, aimed at expanding the pool of arbitrators, and providing training. The Working Group may wish to consider the option of developing a broader roster system or exploring various ways of setting up pre-agreed lists of arbitrators/adjudicators.

3. Cost and duration

57. The working Group may wish to note the current efforts to increase the efficiency of the proceedings that have been made by States in the investment treaties, by arbitration institutions through the revision of their rules or other guidance material, and by tribunals with regard to case management based on the discretion provided to them. UNCITRAL also revised its Arbitration Rules in 2010 to enhance the efficiency of arbitration under the Rules and in 2013 to incorporate the UNCITRAL Transparency Rules in Treaty-based Investor-State Arbitration. The Working Group may also wish to note that the proposed amendments to the ICSID rules also aim at addressing cost and time of ICSID proceedings.[26]

58. In that context, the Working Group may wish to consider the following reform options to improve the cost- and time-effectiveness of ISDS proceedings.

(a) Dispute prevention

59. Any dispute or even the possibility of a dispute between a State and an investor is a burden on both parties. Such a dispute can be seen as increasing transactional costs of investors including possible loss of business opportunities and entailing economic and social cost for States including a negative impact on its foreign investment inflow. Therefore, development of good practices and sharing of institutional information to prevent disputes could be considered.

(b) Promotion of dispute settlement mechanisms other than arbitration

60. The Working Group may wish to note that despite increasing efforts to promote forms of dispute settlement other than arbitration, such as mediation, they still remain

[25] See CIDS Supplemental Report on various alternative means of appointment for adjudicators, available at http://www.uncitral.org/pdf/english/workinggroups/wg_3/CIDS_Supplemental_Report.pdf

[26] See ICSID Secretariat, Proposals for Amendment of ICSID Rules, footnote 12, supra

underused in ISDS. The Working Group may wish to consider ways to enhance the use of such means of dispute settlement.

(c) Expedited arbitration

61. The Working Group may wish to consider developing tools to facilitate the use of expedited arbitration procedures, and uniform principles to improve quality and efficiency of the ISDS proceedings. This would in particular allow for a more effective resolution of disputes that are less complex and/or relate to smaller amounts.

(d) Advisory centres

62. The Working Group may wish to consider the establishment of advisory centres to support developing countries and SMEs in ISDS. Such mechanisms may provide legal services and capacity-building programmes on ISDS.

(e) Third-party funding

63. The Working Group may wish to consider whether third-party funding may be utilized to address the financial burden of the parties to ISDS proceedings. In that context, the need to provide more harmonized rules on the practice of third-party funding may also be considered.

(f) Replacement of ad hoc arbitrators by full-time judges

64. The Working Group may wish to consider whether the costs incurred by the current ad hoc appointment mechanism could be alleviated by having ISDS resolved through a permanent body consisting of full-time judges. Such an option would be based on assumptions that the remuneration of judges would be determined using criteria different from the current fee determination for arbitrators, and that it would therefore be less costly to the parties (see also above, para. 55).

(g) Streamlined procedure and tools to manage costs

65. As a way to reduce the duration of ISDS proceedings, the Working Group may wish to consider the streamlining of procedures and the implementation of stricter timelines for the parties, as well as the tribunal, coupled with compliance mechanisms.[27]

66. As a way to manage the cost of ISDS proceedings effectively, the Working Group may wish to consider requiring parties and the tribunal to establish a budget at the outset of a case; adopting a ceiling for overall costs; and requiring tribunals to provide parties with enhanced, real-time information about the status of a case, including the budget.[28]

67. A further way to address both the cost and time of ISDS proceedings could also be through improved case management. In that context, the Working Group may wish to consider suggesting consultations between the tribunal and parties regarding the organization of the proceedings, including early case management conferences.[29]

(h) Early or expeditious dismissal mechanism

68. In order to address concerns raised about frivolous or unmeritorious claims resulting in increased cost and duration, the Working Group may wish to consider as a reform option effective early or expeditious dismissal mechanisms (or their introduction if not already existing).[30]

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[27] Ibid

[28] See also the UNCITRAL notes on Organizing Arbitral Proceedings (2016), available at http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-2016-e.pdf

[29] Ibid

[30] Development of solutions modelled around Rule 41(5) of the ICSID Arbitration Rules could also be envisaged

(i) Developing principles on allocation of cost and security for costs

69. The Working Group may wish to consider the following reform options: (i) clear and definitive rules on allocation of costs, with tribunals making costs orders on an interim basis so as to keep parties cost-conscious; (ii) urging tribunals to be more active in adjusting costs; (iii) identifying specific factors to be considered in allocating costs, such as outcome, the parties' conduct, the complexity of the issues; and the reasonableness of the costs claimed as well as the use of third-party funding; and (iv) introduction of clear rules or mechanisms on security for costs to ensure recovery of costs of respondent States.

(j) Others

70. The Working Group may also wish to consider whether allowing counterclaims by respondent States, and setting a more streamlined procedure for post-award actions including interpretation, revision and annulment and introduction of stricter timelines, would have a positive impact on cost and duration of ISDS proceedings.

Annex

Tabular presentation of framework for discussion

Concerns identified by the Working Group	*Possible reform options for discussion*	*Main implications*	*Impact on the existing ISDS regime*
A. Inconsistency and lack of predictability			
Diverging interpretations of substantive standards	**A.1. Enhancing Contracting States' control over their instruments** by setting up mechanism(s) for treaty interpretation and related questions aimed at encouraging a more systematic use of: - Unilateral interpretations, - Joint interpretations, or - Multilateral interpretations and also aimed at ensuring abidance by arbitrators and decision-makers	Setting up of new mechanism(s) for treaty interpretation and related questions, such as: - Ad hoc authoritative interpretation mechanism - Authoritative interpretation by treaty institutions - Mechanism for the release of *travaux préparatoires* - Renvoi mechanism of interpretative questions	The option strengthens and generalizes the existing mechanisms for treaty interpretation (and other related mechanisms) Compatible with the existing ISDS regime The option can accompany any other option for reform
Limits of the current mechanisms to address inconsistency and incorrectness of decisions	**A.2. Strengthening the involvement of State authorities** by establishing/strengthening the framework for State-State preliminary consideration of issues, including: - Technical consultations - Decisions by the respective State authorities - Setting up a joint review committee by the treaty Parties, - Review/Appeal mechanism or State-State body to apply if the claim cannot be settled at the technical level in a given time period	- Development of a new legal standard for inclusion in investment treaties and/or - Setting up of a multilateral framework, also applicable to existing treaties: - An appellate mechanism or - A body to allow for an appeal of joint State authorities' decisions - Can also address Lack of predictability Frivolous claims (see also **C.8.**) Costs, Abuse of process (see also **C.**)	The option strengthens the role of States regarding their treaties, and could limit access to ISDS Compatible with the existing ISDS regime as a pre-dispute mechanism The option can accompany any other option for reform

Concerns identified by the Working Group	*Possible reform options for discussion*	*Main implications*	*Impact on the existing ISDS regime*
Lack of framework to address multiple proceedings	**A.3. Guidance to arbitral tribunals or claims commissions** (i) Where different entities within the same corporate structure have a right of action against a State regarding the same investment/same State measure and for the benefit of substantially the same interests, possibility to consider developing legal standards regarding: - Proactive use of consolidation - Possibility to exchange information between tribunals - Stay of proceedings - Considering the use of *lis pendens* and *res judicata* (ii) In the situation of a concurrent proceeding where a measure by a State has an impact on a number of investors which are not related, possibility to consider: - Systemic approach to recurrent disputes by the creation of claims commissions - System of preliminary rulings by specific bodies (see below, **A.6.**) - Class action for investors	Development of new legal standards (see A/CN.9/915) - Can also address Abuse of process Judicial economy Costs and Duration (see also **C.**)	The role of tribunals is strengthened in options listed under (i), and the role of States is enhanced in options listed under (ii) Possible impact on: - Arbitral institutions, their rules, practices and role - Non-institutional arbitration rules The option can accompany any other option for reform, but may become redundant with option **A.9.**, although some of the features may also apply to the reform option **A.9.**
Limits of the current mechanisms to address inconsistency and incorrectness of decisions	**A.4. Scrutiny system** (mechanism or body) for awards prior to issuance	Setting up of a system (mechanism or body) in charge of scrutiny of awards prior to issuance - Can also facilitate Quality Consistency and control of correctness of decisions Enforceability	Possible impact on the role of arbitral institutions Question of non-institutional arbitration to be considered The option can accompany any other option for reform, but may become redundant with option A.9.
Limits of the current mechanisms to address inconsistency and incorrectness of decisions	**A.5. Introducing a system of binding precedent**	Setting up of a new mechanism to introduce binding precedent and practical application	Compatible with the existing ISDS regime The option can accompany any other option for reform, but may be difficult to implement in an ad hoc ISDS regime

Concerns identified by the Working Group	*Possible reform options for discussion*	*Main implications*	*Impact on the existing ISDS regime*
		- Can also address Lack of predictability - Can also facilitate Control of correctness of decisions	
	A.6. System of preliminary rulings by specific bodies	Setting up of a system (mechanism or body) allowing preliminary ruling by other international tribunals or domestic courts	The relationship between specific bodies and the ICSID Convention, as it does not foresee preliminary rulings, should be considered The option can accompany any other option for reform
	A.7. Appellate review mechanism, designed for inclusion in investment treaties (ad hoc system), or agreed to by the disputing parties	Development of an appellate review mechanism Questions of flexibility and scope	The relationship between an appellate mechanism and the ICSID Convention, which excludes any appeal or other remedy, except for those provided for in the Convention itself (Article 53) would deserve careful consideration The impact on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) should also be addressed The option can accompany any other option for reform
	A.8. Appellate body, set-up as an institutional mechanism, possibly tasked with a review of awards and decisions made by: - Arbitral tribunals - International investment court - Regional investment court - International commercial courts - Domestic courts in case of denial of justice	Setting up of a stand-alone appellate body, which would require preparing status to determine its functioning, and an instrument for disputes arising under existing investment treaties	The relationship between an appellate body and the ICSID Convention, which excludes any appeal or other remedy, except for those provided for in the Convention itself (Article 53) would deserve careful consideration The impact on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) should also be addressed The option can accompany any other option for reform

Concerns identified by the Working Group	*Possible reform options for discussion*	*Main implications*	*Impact on the existing ISDS regime*
Limits of the current mechanisms to address inconsistency and incorrectness of decisions	**A.9. International investment court**	Setting-up of a multilateral investment court, which would require preparing status to determine its functioning, and an instrument for disputes arising under existing investment treaties - Can also facilitate Control of correctness of decisions - Can also address Arbitrators and decision-makers appointment (see also **B.**) Ethical requirements (see also **B.**)	The co-existence or articulation with the existing ISDS regime as well as with regional investment courts would need to be considered The option may make a number of other options for reform redundant
Other issues			
B. Arbitrators/Decision-makers			
Lack of clarity regarding standards on independence and impartiality, issue conflicts	**B.1. Development of a code of conduct and other ethical requirements** for - Arbitrators and decision makers, and - Possibly other persons involved in ISDS (for instance, counsels, experts) It would include determining appropriate sanctions in case of non-compliance	Development of a new legal standard, possibly together with an enforcement mechanism aimed at supplementing and harmonizing the existing legal framework, together with soft law guidance on its use	The option strengthens and harmonizes the ethical framework, including the existing soft law framework It could be referred to in investment treaties, and implemented by arbitral institutions, or any newly set up body The option can accompany any other option for reform
Limitations of challenge mechanisms	**B.2. Development of rules and procedures to strengthen existing challenge mechanisms**	Development of a new legal standard, aimed at supplementing and harmonizing the existing legal framework, together with soft law guidance on its use	Strengthen and harmonize the existing legal framework regarding challenge procedures The impact on arbitral institutions' practice and their arbitration rules should be considered The impact on domestic legislation (including the Model Law on International Commercial Arbitration) would also need to be assessed The option can accompany any other option for reform

Concerns identified by the Working Group	*Possible reform options for discussion*	*Main implications*	*Impact on the existing ISDS regime*
Limitations of challenge mechanism	**B.3. Control system for challenges** through arbitration institutions and/or independent body (e.g. international court (first instance), appellate body (first or second instance), other)	Development of a new legal standard aimed at supplementing and harmonizing the existing legal framework	The option strengthens and harmonizes the existing legal framework regarding challenge procedures The impact on arbitral institutions' practice and their arbitration rules should be considered The impact on domestic legislation (including the Model Law on International Commercial Arbitration) would also need to be assessed The option can accompany any other option for reform
Constitution of tribunals (limitations of party appointment mechanisms), impact of party remuneration, dissenting opinions and repeat appointments of certain arbitrators, limited number of individuals repeatedly appointed as arbitrators, lack of diversity	**B.4. Appointments through alternative methods**, such as: - Increased use of appointing authorities with more transparent processes - Use of pre-established list of arbitrators/Decision-makers - Mechanisms used in other international courts and bodies, such as WTO DSU (including appellate body)	Setting up of a new system (mechanism or body)	The reform option may have a direct impact on party appointment mechanisms The impact on arbitral institutions' practice and their arbitration rules should be considered The option can accompany any other option for reform
Limited number of individuals repeatedly appointed as arbitrators, lack of diversity, Competence and qualifications of arbitrators	**B.5. Training, rosters and certifications**	- Enhancing cooperation and coordination among existing regional and international programmes - Development of dedicated programmes to: - Train - Renew - Certify arbitrators and decision-makers	The impact on arbitral institutions' practice and their arbitration rules should be considered Cooperation among organizations should also be considered See also reform option **C.4.** in particular the role of advisory centres regarding arbitrators training, certification and selection.
Limited number of individuals repeatedly appointed as arbitrators, lack of diversity, Competence and qualifications of arbitrators	**B.6. Pledge for diversity**	Soft law and principles to enhance diversity	
Other issues			

Concerns identified by the Working Group	*Possible reform options for discussion*	*Main implications*	*Impact on the existing ISDS regime*
C. Cost and duration			
Lengthy and costly ISDS proceedings	**C.1. Dispute prevention**	Development of relevant good practices and institutional information to prevent disputes Can also address excessive financial burden on the parties – limited resources for respondent States and SMEs	The option strengthens and improves good governance and other regulatory practices of States The options should accompany any other option for reform
Lengthy and costly ISDS proceedings	**C.2. Promotion of dispute settlement** mechanisms other than arbitration (for instance, mediation and ombudsman facilities)	Promotes early settlement of disputes particularly during the cooling-off period Development of relevant rules and establishment of relevant facilities	The option strengthens the existing ISDS mechanisms, currently under used The options should accompany any other option for reform
Lengthy and costly ISDS proceedings	**C.3. Expedited procedures:** - for smaller claims and non-complex cases	Development of relevant rules and practice	The option strengthens the existing mechanisms The options can accompany any other option for reform
Lengthy and costly ISDS proceedings	**C.4. Advisory centres**	Resources for the establishment of relevant facilities to provide support particularly to developing States and SMEs	No impact on the existing ISDS regime The options can accompany any other option for reform
Lengthy and costly ISDS proceedings	**C.5. Third-party funding**	Need for harmonized rules or regulation of third-party funding	Impact on the overall ISDS procedure including transparency requirement, security for costs and allocation of costs
Lengthy and costly ISDS proceedings	**C.6. Replacement of ad hoc arbitrators by full-time judges** (see also option for reform **A.9.** and **B.4.**)	Setting up of a permanent mechanism or body	The reform option may have a direct impact appointment mechanism and would require the introduction of a different remuneration mechanism for decision makers The option can accompany any other option for reform

Concerns identified by the Working Group	*Possible reform options for discussion*	*Main implications*	*Impact on the existing ISDS regime*
Lengthy and costly ISDS proceedings	**C.7. Streamlined procedure and tools to manage costs** - Streamlining the procedure including the introduction and implementation of stricter time line - Requiring parties and the tribunal to establish a budget at the outset of a case - Adopting a ceiling for overall costs; and - Requiring tribunals to provide parties with enhanced, real-time information about the status of a case, including budget	Introduction of stricter timelines and compliance mechanisms More effective management of costs through information-sharing Improved case management by the tribunals	See proposed ICSID Amendments The option can accompany any other option for reform
Lack of a mechanism to address frivolous or unmeritorious claims	**C.8. Availability of an effective early or expeditious dismissal mechanism**	See option for reform **A.2.**	See option for reform **A.2.**
Allocation of cost by ISDS tribunals; difficulties for States in cost recovery and need for rules on security for costs	**C.9. Principles/guidelines on allocation of cost and security for costs**	Development of principles and rules that provide guidance to tribunals in allocating costs and ordering security for costs	
Others	**C.10.** Streamline procedure for post-award actions such as interpretation, revision and annulment Allowing counterclaims by respondent States		
D. Other issues to be considered by the working Group	**Other possible solutions**		

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Possible reform of investor-State dispute settlement (ISDS): Consistency and related matters

Note by the Secretariat

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I. Introduction

1. At its thirty-fifth session, the Working Group suggested that the Secretariat (i) prepare a list of the concerns about investor-State dispute settlement (ISDS) raised during its thirty-fourth and thirty-fifth sessions, (ii) set out a possible framework for its future deliberations, and (iii) consider the provision of further information to assist States with respect to the scope of some concerns (A/CN.9/935, paras. 99 and 100).

2. Document A/CN.9/WG.III/WP.149 addresses items (i) and (ii) at an overview level. This Note considers the topic of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals, and provides additional information on that topic.

3. As is the case for other documents provided to the Working Group, this Note was prepared with reference to a broad range of published information on the topic,[1] and does not seek to express a view on the desirability of reforms, which is a matter for the Working Group to consider.

II. Consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals

A. Assessment of identified concerns

1. Identified concerns

4. This note focuses on the concerns raised at the thirty-fourth and thirty-fifth sessions of the Working Group with respect to the consistency, coherence, predictability and correctness of decisions made by arbitral tribunals in ISDS cases (A/CN.9/930/Add.1/Rev.1, paras. 9–35; and A/CN.9/935, paras. 20–44).

5. At the thirty-fourth session of the Working Group, it was indicated that criticism of a lack of consistency and coherence was one of the reasons behind the Commission's decision to embark on work on possible ISDS reform, thereby acknowledging the importance of ensuring a coherent and consistent ISDS regime. It was said that consistency and coherence would support the rule of law, enhance confidence in the stability of the investment environment and further bring legitimacy to the regime. It was also said that inconsistency and lack of coherence, on the other hand, could negatively affect the reliability, effectiveness and predictability of the ISDS regime and its credibility (A/CN.9/930/Add.1/Rev.1, para. 11).

6. It may be noted that different factors may justify differences between arbitral decisions or awards. For example, differences may emerge because the fundamental rules of treaty interpretation (codified in Articles 31–33 of the Vienna Convention on the Law of Treaties) require a decision maker to consider more than the plain language of a treaty provision when interpreting it. Further, differences in reasoning and outcome may inevitably flow from differences in the manner and extent to which relevant evidence was presented, and positions were argued.

7. In order to delineate these concerns, a distinction was made between divergent decisions that were justified (reflecting, for example, rules of treaty interpretation or different facts and evidence before the tribunal) and differing interpretations which

[1] This Note was prepared with reference to a broad range of published information on the topic (see bibliographic references published by the Academic Forum, available under "Additional resources" at http://www.uncitral.org/uncitral/en/publications/online_resources_ISDS.html). The preparation of this note, and in particular section A.2, benefitted from contributions by the Practitioners Group (see more information on the Group at http://www.uncitral.org/pdf/english/workinggroups/wg_3/Practitioner_Group_Statement_of_Purpose.pdf), by the Geneva Center of International Dispute Settlement (CIDS) as well as by the following experts: José J. Caicedo, Damien Charlotin, Melida Hodgson, Lise Johnson (CCSI), Josef Ostransky (CIDS), Michele Potestà (CIDS), Jeremey Sharpe and Derek Smith.

could not be justified (for example, contradictory interpretations of the same substantive standard in the same treaty or the same procedural issue). The Working Group agreed to focus its discussions on the latter category (unjustifiable inconsistency) and to consider its prevalence and impact (A/CN.9/935, para. 25).

8. During the discussion in the Working Group, it was also agreed that seeking to achieve consistency should not be to the detriment of the correctness of decisions, and that predictability and correctness should be the objective rather than uniformity (A/CN.9/935, para. 26).[2] Indeed, the Working Group considered that consistency and coherence were not objectives in themselves and that caution should be taken in trying to achieve uniform interpretation of provisions across the wide range of investment treaties, considering that the underlying investment treaty regime itself was not uniform (A/CN.9/930/Add.1/Rev.1, paras. 11, 17 and 18).

2. Prevalence and impact of unjustified inconsistency

9. During the thirty-fourth session of the Working Group, some States reported the experience of having investment treaties with similar provisions interpreted differently by tribunals, including in an instance of concurrent proceedings in which the facts, parties, treaty provisions and applicable arbitration rules were identical (A/CN.9/930/Add.1/Rev.1, para. 14).[3] It was further said that international rules on treaty interpretation and customary international law were not always consistently applied by ad hoc tribunals (A/CN.9/930/Add.1/Rev.1, para. 13). At its thirty-fifth session, the Working Group considered that inconsistency, and the resulting lack of predictability, was more of a concern where the same investment treaty standard or same rule of customary international law was interpreted differently in the absence of justifiable ground for the distinction (A/CN.9/935, para. 21).

10. The Working Group may wish to consider (i) the main scenarios under which inconsistency in decision-making has arisen in practice, and (ii) illustrations from areas of law affected by inconsistent decisions.

(a) Different scenarios

11. *First*, different tribunals have reached different conclusions about the same standard in the same investment treaty or about the same procedural issue, including where the facts were similar, or had differences that have been considered not to be sufficient to justify a different outcome. The often-cited examples include decisions by arbitral tribunals under the North American Free Trade Agreement (NAFTA),[4] as well as decisions in arbitrations interpreting, for instance, the essential security clause.[5] Similarly, arbitral tribunals have come to different interpretations of certain notions contained in the ICSID Convention (see paras. 17 and 25 below).

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[2] See also the OECD study at http://www.oecd.org/investment/internationalinvestmentagreements/50291642.pdf, p. 61.

[3] See also UNCTAD, IIA Issues Note No 2, *Reform of investor-state dispute settlement* (Arbitral decisions that have been made publicly available have "exposed recurring episodes of inconsistent findings ... [including] divergent legal interpretations of identical or similar treaty provisions as well as differences in the assessment of the merits of cases involving the same facts. Sometimes, divergent outcomes can be explained by the differences in wording of a specific IIA applicable in a particular case, however, often they represent the differences in the views of individual arbitrators.")

[4] *S. D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000; *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001.

[5] *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005; *Enron Corporation Ponderosa Assets, L.P. v. The Republic of Argentina*, ICSID Case No. ARB/01/3, Award, 22 May 2007; *LG&E Energy Corp., L&E Capital Corp., LG&E International Inc. v. The Republic of Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006; *Continental Casualty Company v. The Republic of Argentina*, ICSID Case No. ARB/03/9, Award, 5 September 2008.

12. *Second*, arbitral tribunals organized under different investment treaties have reached different conclusions about disputes involving the same measure, related parties, and similar treaty standards and/or applicable legal rules. The most prominent illustration in investment arbitration may be the often-cited cases of *Lauder v. Czech Republic* on the basis of the US-Czech Republic bilateral investment treaty (BIT) and *CME Republic BV v. Czech Republic* on the basis of the Netherlands-Czech BIT. These two proceedings involved: the same measure and harm; in part, the same claimant from an economic perspective (Mr. Lauder who brought a claim in his own name in one proceeding and as a shareholder of CME in the other), but different legal persons (CME and Mr. Lauder), with different nationalities (Dutch and American); and two separate investment treaties. In the end, the two arbitrations resulted in contrary outcomes (a (quasi) dismissal of the claims in one case and an award of damages in the other).[6]

13. *Third*, arbitral tribunals organized under different investment treaties or the same investment treaty have dealt with disputes involving unrelated parties, but similar facts and have reached opposite interpretations of the applicable legal rules. This situation typically arises when a measure taken by a State has an impact on a number of unrelated investors.[7] States have often adopted policies relating generally to foreign investments, as part of their efforts to attract investments into given sectors, thereby increasing the occurrence of dealings with a wide range of investors. When a State adopts a measure that potentially affects a number of investors, it may be faced with multiple claims from those unrelated investors in relation to that measure. For example, a change of a State policy (or that of a state-owned entity) may affect a whole range of investments made by different investors. While issues of law and fact raised in those proceedings will generally be common to all of the claimants, it is foreseeable that decisions rendered by separate tribunals may yield different interpretations.

(b) Areas of law concerned

14. At its thirty-fourth session, the Working Group heard examples of inconsistent decisions from delegations. The examples concerned the definition of "investment" and whether investments were required to be made "in" or "for the benefit of" the host country; the application of the most-favoured nation (MFN) clause to dispute settlement; the notion of indirect expropriation; the interpretation of the scope and effect of the umbrella clause; the identification and application of principles of customary international law; procedural decisions on security in annulment proceedings; treatment of awards in terms of enforcement; ability of States and investors to contract out of ISDS provisions (see A/CN.9/935, paras. 31 and 32); situations of concurrent or multiple proceedings (see also A/CN.9/915, paras. 5 and 6); general rules of customary international law involving the state of necessity/emergency, the law of attribution, and the legal principles regarding damages (A/CN.9/930/Add.1/Rev.1, para. 30).

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[6] *CME and Lauder (CME Czech Republic B.V. v. Czech Republic*, Ad hoc UNCITRAL Arbitration Rules, Partial Award of 13 September 2001, Final Award of 14 March 2003 and *Lauder v. Czech Republic*, Ad hoc UNCITRAL Arbitration Rules, Final Award, 3 September 2001) as well as the *SGS cases* which involve interpretation of the so-called umbrella clauses (*SGS Societe Generale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003 and *SGS Societe Generale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004; SGS *Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Award, 10 February 2012).

[7] See A/CN.9/881, paras. 8 and 20(ii). See, for instance, *Charanne and Construction Investments v. Kingdom of Spain*, SCC Case No. V 062/2012, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, *Isolux Netherlands, BV v. Kingdom of Spain*, SCC Case V2013/153, *Portigon AG v. Kingdom of Spain*, ICSID Case No. ARB/17/15, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30.

15. The Working Group may wish to consider the illustrative list below of instances of divergent interpretations of substantive standards; divergent interpretations relating to jurisdiction and admissibility; and procedural inconsistency. The Working Group may wish to note that the focus in this illustrative list is recent or relatively recent cases (rendered over the past 15 years) in an effort to take account of evolving trends.

16. Examples of substantive protection standards that have been interpreted differently are as follows:

(i) Fair and Equitable Treatment (FET): Even if commentators have observed certain trends over time,[8] there remains inconsistency in the determination of the content and level of the obligations under FET clause.[9] Divergent interpretations may be noted regarding:

- Whether the notion of denial of justice covers substantive denials of justice and not merely procedural ones,[10] and the standard for finding a denial of justice in the context of FET protection;[11]
- Whether a breach of an investor's legitimate expectations could in itself breach the FET standard and, if so, whether these expectations must be grounded in a specific commitment on the part of the host State or can arise from general legislation;[12]

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[8] For example, commentators have noted that tribunals seem to have increasingly emphasized the need for a stable legal and business framework in the host State, abandoned the requirement of bad faith on the part of the host State, and taken into account the legitimate expectations of the foreign investor. See, for instance, Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford University Press, 2013); Jonathan Bonnitcha, *Substantive Protection under Investment Treaties* (Cambridge University Press, 2014), Chapter 4

[9] See, for instance, decisions interpreting FET rather broadly: *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000; *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003; *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015; and by contrast, decisions interpreting FET more restrictively, for instance, *Waste Management Inc. v United Mexican States ("Number 2")*, ICSID Case No. ARB(AF)/00/3, Award 30 April 2004; *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006; *Invesmart v. Czech Republic*, UNCITRAL, Award, 26 June 2009

[10] See, for instance, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008 (paras. 207–261, where the Tribunal looked at both allegations of substantive and procedural denial of justice but without finding that they were sustained). See also *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012 (paras. 276–99); *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award, 31 May 2016 (paras. 239 to 270, which only covers procedurals denials of justice). See also *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/13/38 (paras. 427 seq., on the procedural denial of justice examination).

[11] For a proposition that customary international law denial of justice and FET are inseparable and have evolved into a modern version of denial of justice see, for instance, *OAO Tatneft v. Ukraine*, UNCITRAL, 29 July 2014, Award on the Merits, for a proposition that FET refers to the customary international law notion of denial of justice see, for instance, *Iberdrola Energia S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Award, 17 August 2012

[12] For cases denying the possibility of protected expectations arising out of legislation see, for instance, *Charanne and Construction Investments v. Kingdom of Spain*, SCC Case No. V 062/2012, Award, 21 January 2016; *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016; *Ulysseas, Inc. v. The Republic of Ecuador*, UNCITRAL, Final Award, 12 June 2012; *Conviat Callao S.A. and CCI — Compañia de Concesiones de Infraestructura S.A. v. Republic of Peru*, ICSID Case No. ARB/10/2, Final Award, 21 May 2013; in contrast for decisions implying or explicitly allowing this possibility, for instance, *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on

- Whether investment treaties providing for FET "in accordance with international law" (or similar wording) refer to the minimum standard of treatment under international law, or to another "autonomous" standard (by contrast with investment treaties that just refer to "FET").[13]

(ii) Umbrella Clauses: Some decisions adopt restrictive or conditional interpretations of umbrella clauses,[14] whereas others adopt broad and unconditional interpretations, irrespective of the wording of the clause itself.[15]

(iii) Essential security provisions/Necessity doctrine: It is generally accepted that the customary international law doctrine of necessity is embodied in article 25 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (the "Draft Articles") of the International Law Commission.[16] The doctrine of necessity was extensively argued in cases either as the primary defence or, in the presence of a treaty-based "essential security" provision, as an alternative defence.[17] In a series of ICSID arbitral decisions, inconsistency when discussing the notion of necessity is found between arbitral tribunals and ad hoc Committees in charge of reviewing the application for annulment of the awards.[18]

Jurisdiction, Applicable Law and Liability, 30 November 2012, *Total S.A. v. The Republic of Argentina*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010.

[13] See, for instance, *S. D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000 (see paras. 262–263: "The phrases ... fair and equitable treatment ... and ... full protection and security ... cannot be read in isolation. They must be read in conjunction with the introductory phrase ... treatment in accordance with international law [...] The Tribunal considers that a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective"; *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001 (see para. 111: "The Tribunal interprets that formulation as expressly adopting the additive character of the fairness elements. Investors are entitled to those elements, no matter what else their entitlement under international law. A logical corollary to this language is that compliance with the fairness elements must be ascertained free of any threshold that might be applicable to the evaluation of measures under the minimum standard of international law.").

[14] *SGS Societe Generale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003; *SGS Societe Generale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6 (2004); *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009.

[15] *Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Award, 10 February 2012; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. The Republic of Argentina*, ICSID Case No. ARB/03/23, Award, 11 June 2012.

[16] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, Yearbook of the Int'l Law Commission, 2001, Vol. II Part 2 also available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

[17] See, for instance, *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Award, 24 December 2007, paras. 387–388; *CMS*, para. 318 seq.; *Total S.A. v. The Republic of Argentina*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, para. 219.

[18] *Sempra Energy International v. The Republic of Argentina*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010, paras. 186–207; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 (also known as: *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Republic of Argentina*), Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, para. 406 seq.; *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, para. 150. The application for annulment in CMS was dismissed despite the ad hoc Committee's disagreement with the analytical approach taken by the CMS tribunal, while afterwards the ad hoc Committees in both the *Enron* and *Sempra* cases annulled the findings of the arbitral tribunals based in part on the logic provided in the CMS annulment on Argentina's necessity defence.

(iv) Favourable investment conditions: Arbitral tribunals have given inconsistent interpretations of the commitment made by States in many investment treaties to create "favourable investment conditions".[19]

17. Illustrations of divergent interpretations relating to jurisdiction and admissibility are as follows:

(i) In cases before ICSID, arbitral tribunals vary in their interpretations of the outer limits of subject-matter jurisdiction under article 25(1) of the ICSID Convention. As an illustration, there have been divergent interpretations on whether:

- The contribution to the host State's economic development is a criteria for the definition of an investment;[20]
- An offtake agreement is an investment under an investment treaty and the ICSID Convention;[21]
- Portfolio investments are protected;[22] and
- The notion of a company's head office should be interpreted under domestic law, or as an autonomous term under the applicable investment treaty, or by reference to customary international law, and whether an autonomous definition would amount to an effective seat or place of registration.[23]

[19] While some tribunals have considered it as an obligation to "encourage and promote favourable conditions for investors" but not a "stand-alone, positive commitment giving rise to substantive rights" in *White Industries Australia Limited v. India*, UNCITRAL, Final Award, 30 November 2011, para. 9.2.12, others have recognized a substantive obligation to encourage favourable conditions for investors, as in *National Grid v. The Republic of Argentina*, UNCITRAL, Award, 3 November 2008, para. 170.

[20] For decisions accepting the requirement of contribution to the economic development, see for instance, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 31 July 2001, *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, 17 May 2007; for decisions which do not recognize a contribution to the economic development as a jurisdictional requirement, see for instance, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, *Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010.

[21] For cases not accepting offtake agreement as an investment see, for instance, *Tenaris S.A. and Talta – Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award, 29 January 2016; for cases accepting an offtake agreement as an investment being part of a larger economic transaction see, for instance, *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award, 30 October 2017.

[22] For decisions accepting portfolio investments as protected see, for instance, *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, *Abaclat and Others v. The Republic of Argentina*, ICSID Case No. ARB/07/5 (formerly *Giovanna Beccara and others v. The Argentine Republic*), Decision on Jurisdiction and Admissibility, 4 August 2011, *Ambiente Ufficio S.p.A. and others v. The Republic of Argentina*, ICSID Case No. ARB/08/9 (formerly *Giordano Alpi and others v. Argentine Republic*), Decision on Jurisdiction and Admissibility, 8 February 2013, *Giovanni Alemanni and Others v. The Republic of Argentina*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, 17 November 2014; for decisions holding to the contrary see, for instance, *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015.

[23] For decisions interpreting the term "*siège social*" under the applicable BITs as "place of effective management", see, for instance, *Tenaris S.A. and Talta – Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award, 29 January 2016 and *Tenaris S.A. and Talta – Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23, Award, 12 December 2016; for decisions interpreting the term "*siège social*" under the applicable BIT as "registered office", see, for instance, *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*,

(ii) Diverging interpretations have been given regarding the impact of denunciation of the ICSID Convention on arbitral tribunal's jurisdiction.[24]

(iii) Different approaches have been observed on whether the effective control of a claimant over a relevant entity must be merely legal or also factual.[25]

(iv) Whether an award could qualify as an investment.[26]

(v) Related parties' pursuit of multiple claims for damages: three divergent approaches can be distinguished from the practice. Under a first approach, the claims are admissible, but the tribunal must prevent double recovery (i.e., solution sought at level of damages).[27] Under a second approach, a tribunal

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ICSID Case No. ARB/12/35, Final Award, 31 May 2017. See also *Central European Aluminium Company (CEAC) v. Montenegro*, ICSID Case No. ARB/14/8, Award, 26 July 2016.

[24] For decisions accepting jurisdiction for arbitration filed post-denunciation within the 6-months period mentioned in article 71, see, for instance, *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/22, Award, 3 April 2015; *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016; *Tenaris S.A. and Talta — Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23, Award, 12 December 2016; *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB 12/20, Award, 26 April 2017; *Transban Investments Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/24, Award, 22 November 2017; for decisions not accepting jurisdiction for cases filed within the 6-months period, see, for instance, *Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/21, Award, 13 November 2017.

[25] See *Banro American Resources, Inc. & Société Aurifère du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No. ARB/98/7, Award, 1 September 2000 where the Tribunal held that the transfer from one entity to another of an investment would not be sufficient to allow the latter entity to trigger ICSID arbitration, considering the need for consent of the parties (paras. 3–5); *Caratube International Oil Company LLP and Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017 ("There can be no dispute that the wording of Article 25(2)(b) of the ICSID Convention does not specify the required form and extent of foreign control and, more specifically, does not expressly require actual, effective control, rather than legal control", paras. 611–615); *BG Group PLC v. The Republic of Argentina*, UNICTRAL, Final Award, 24 December 2007 (see notably para. 113, where the Tribunal verified both the legal (participation in the subsidiaries) and factual aspects (testimony provided in order to supplement the participation)); *Daimler Financial Services AG v. The Republic of Argentina*, ICSID Case No. ARB/05/1, Award, 22 August 2012 (see para. 83 "Subparagraph b) of this definition makes clear that the Claimant's 99% shareholding in DCS Argentina indeed constitutes a protected investment under the Treaty."; *TSA Spectrum de Argentina, S.A. v. The Republic of Argentina*, ICSID Case No. ARB/05/5, Award, 19 December 2008 (see paras. 134–162, where the Tribunal held that "it is necessary to pierce the corporate veil and establish whether or not the domestic company was objectively under foreign control."); *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 (see para. 316: "the Tribunal considers that a more flexible and pragmatic approach to the meaning of "investment" is appropriate"); *Consortium Groupement LESI – DIPENTA v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/8, Award, 10 January 2005 (see paras. 37–41, where the Tribunal adopted a strict legal view on the claimant (a consortium) incapacity to request for arbitration in lieu of the subsidiary which signed the investment contract); *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction, 6 August 2003 (see paras. 136–137: the Tribunal looked at the factual details, notably the transfer of money to establish and operate liaison offices in Pakistan, to define the notion of investment through a local subsidiary).

[26] For cases not accepting arbitral awards as investments see, for instance, *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award, 26 November 2009; *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011; for cases accepting awards as investment, although for different reasons, see, for instance, *Saipem SpA v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009; *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010; *White Industries Australia Limited v. India*, UNCITRAL, Final Award, 30 November 2011.

[27] See *CME Czech Republic B.V. v. Czech Republic*, Ad hoc UNCITRAL Arbitration Rules, Partial Award, 13 September 2001, Final Award, 14 March 2003 and *Lauder v. Czech Republic*, Ad hoc

held that once jurisdiction is established, the claimant must elect in which proceeding it wished to pursue the overlapping portion of its claims. Failure to do so could trigger an abuse of process finding by the arbitral tribunal at subsequent procedural stages (i.e. solution found at level of merits).[28] Under a third approach, a tribunal stated that "where multiple treaties offer entities in a vertical chain similar procedural rights of access to an arbitral forum and comparable substantive guarantees, the initiation of multiple proceedings to recover for essentially the same economic harm would entail the exercise of rights for purposes that are alien to those for which these rights were established" (i.e., solution found at level of admissibility).[29]

18. Illustrations of procedural inconsistencies are as follows.

(i) Before the commencement of arbitral proceedings:

- Most Favoured Nation (MFN) clause: Major differences have arisen regarding the application of the MFN clause to dispute settlement provisions. Some decisions have accepted that the MFN clause would permit modification of the dispute settlement provisions of otherwise applicable treaties,[30] while others have denied that possibility;[31]
- Different treatments or approaches have been observed regarding:
  - The waiting or cooling-off period;[32]

UNCITRAL Arbitration Rules, Final Award, 3 September 2001 as well as the *SGS Societe Generale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13 and *SGS Societe Generale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6.

[28] See *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on jurisdiction, 1 February 2016, paras. 330–339; *Mr. Yosef Maiman and Others v. Egypt*, UNCITRAL (not public).

[29] *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Final Award, 31 May 2017, para. 543.

[30] See, for instance, *Emilio Agustin Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000; *Gas Natural SDG, S.A. v. The Republic of Argentina*, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005; *National Grid plc v. The Republic of Argentina*, Decision on Jurisdiction, 20 June 2006; *AWG Group Ltd. v. The Republic of Argentina*, UNCITRAL, Decision on Jurisdiction, 3 August 2006; *Impregilo S.p.A. v. The Republic of Argentina*, *ICSID Case No. ARB/07/17*, Award, 21 June 2011; *Hochtief AG v. The Republic of Argentina*, Decision on Jurisdiction, 24 October 2011; *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction, October 2007.

[31] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005; *ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina*, UNCITRAL, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012; *Vladimir Berschader and Moise Berschader v. The Russian Federation*, SCC Case No. 080/2004, Award, 21 April 2006.

[32] For cases viewing the cooling-off period as an admissibility issue see, for instance, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016; for cases viewing it as jurisdictional, see, for instance, *Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, 31 January 2014. In *SGS v. Pakistan*, where the concept of the consultation period is seen as very flexible (see para. 184 "Tribunals have generally tended to treat consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature. Compliance with such a requirement is, accordingly, not seen as amounting to a condition precedent for the vesting of jurisdiction"), whereas the arbitral tribunal in *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010 adopted a very strict definition of this mandatory process (providing at paras. 140–157: "In accordance with [the Vienna Convention on the Law of Treaties], it is not possible to ignore the existence of the norms contained in Article VI of the [US-Ecuador] BIT, regarding the obligation of the parties to attempt negotiations in order to resolve their disputes and the impossibility to resort to ICSID before the six-month term has elapsed ... the Tribunal rejects Claimant's argument that the six-month waiting period required by Article VI(3)(a) does not constitute a jurisdictional requirement.").

- The interpretation of the notion of unilateral offer to arbitrate;[33]
- The ability to resort to arbitration on the basis of a repealed foreign investment law;[34] and
- The timing and nature of a State's denial of benefits.[35]

(ii) During the arbitral proceedings, different treatments or approaches have been observed regarding:

- The existence of the requirement to exhaust local remedies;[36]
- The impact of recourse to domestic courts prior to launching an investment arbitration;[37]
- The notion of "continuing breach" as an exception for the applicable statute of limitation of claims;[38]

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[33] For cases holding the principle of *effet utile* applicable, see, for instance, *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33; for cases rejecting applicability of the principle of *effet utile*, see, for instance, *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15.

[34] See *ABCI Investments N.V. v. Republic of Tunisia*, ICSID Case No. ARB/04/12; *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16. In the *ABCI Investments* award, the arbitral tribunal made its decision based on the facts of the case (see paras. 99–100), whereas in the *AES Corporation* the question was clearly answered through the consultation of the relevant legal instruments (see para. 216).

[35] The question receives very different interpretations in arbitral tribunals: in *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, paras. 148–151, it is held that the State cannot deny an investor the benefits of treaty after the investor has filed a request for arbitration, therefore refusing the retroactive effect of benefits clause; in *Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, 31 January 2014, para. 376, however, the tribunal concluded that it "cannot agree with the Claimants when they argue that the Respondent is precluded from applying the denial of benefits clause retroactively".

[36] It is generally accepted that there is no need to exhaust local remedies where consent has been given to investor-state arbitration (see Dolzer and Schreuer, *Principles of International Investment Law*, 2nd ed., p. 264). Certain tribunals have nevertheless held that an investor must make some attempt to find a local remedy to establish that the relevant substantive standard of investment protection has been violated. See *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003. See also *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award, 3 July 2008 which was subsequently annulled on this ground by a decision of the ad hoc Committee dated 14 June 2010.

[37] In *Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/13/38, Award,14 December 2017, the Tribunal held that, once a measure taken by a State has been challenged before domestic courts, the compatibility of such measure with an investment treaty (i.e., arbitrariness of the measure) can no longer be reviewed by the Tribunal and only a denial of justice claim is available to the investor. However, another ICSID tribunal, in *Generation Ukraine v. Ukraine*, articulated the principle that "[I]t is not enough for an investor to seize upon an act of maladministration — without any effort at overturning the administrative fault, and thus to claim an international delict. In such instances, an international tribunal may deem that the failure to seek redress from national authorities disqualifies the international claim, not because there is a requirement of exhaustion of local remedies but because the very reality of conduct tantamount to expropriation is doubtful in the absence of a reasonable — not necessarily exhaustive — effort by the investor to obtain correction." (*Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2004, para. 20.30).

[38] *United Parcel Service v. Canada*, UNCITRAL, Award on the Merits, 24 May 2007 (see para. 28 "continuous course of conduct constitute continuous breaches of legal obligations and renew the limitation period accordingly"); *Eli Lilly v. Canada*, ICSID Case No. UNCT/14/2, Final Award, 16 March 2017 (see para. 170); *Corona Materials LLC v. Dominican Republic*, ICSID Case No ARB(AF)/14/3, Award on the respondent's expedited preliminary objections in accordance with Article 10(20)(5) of the DR-CAFTA, 31 May 2016 (no acceptation of continuous breaches of legal obligations, paras. 200–238); *Spence International Investments, LLC, Berkowitz, et al v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award, 25 October 2016 (see para. 208 "While it may be that a continuing course of conduct constitutes a continuing breach, the Tribunal considers that such conduct cannot renew the limitation period as this would effectively denude the limitation clause of its essential purpose, namely, to draw a

- The allocation of costs;[39] and
- The legal reasoning and the methodology for evaluating damages.

(iii) After the award is rendered:

- Certain aspects of ICSID annulment proceedings, for instance regarding the application for the stay of enforcement of an award.[40]

B. Current mechanisms

19. At the thirty-fifth session of the Working Group, significant concerns were expressed that current mechanisms were not sufficient to ensure that investment treaties would be consistently and correctly interpreted (A/CN.9/935, para. 38).

20. Concerns expressed in the Working Group about inconsistency, incoherence, lack of predictability, and potentially lack of correctness were often linked to questions regarding the adequacy of the existing mechanisms to address such issues (A/CN.9/935, paras. 39–41). The Working Group may wish to consider the extent to which the current mechanisms can operate to achieve consistency among ISDS cases, in particular among investment treaties with the same or substantially similar investor protection standards, or can assist in correcting awards.

21. It was noted that under the current framework, the options for addressing inconsistent or incorrect decisions are limited, as these options have been designed to review awards with the aim to address a limited set of major procedural deficiencies. The existing review mechanisms address the integrity and fairness of the process rather than the consistency, coherence or correctness of the outcomes (see A/CN.9/WG.III/WP.142, para. 39 and A/CN.9/935, para. 23).

22. The options include requesting modification of an award under applicable arbitration rules. However, the rules applicable to the arbitration strictly circumscribe the type of conduct that might justify rectification, and only minor clerical errors tend to be corrected.[41]

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line under the prosecution of historic claims. Such an approach would also encourage attempts at the endless parsing up of a claim into ever finer sub-components of breach over time in an attempt to come within the limitation period "). *Rusoro Mining Limited v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016 (see para. 206, where the Tribunal acknowledged the inconsistency in interpretation of the time bar provision between arbitral tribunals "The Tribunal is mindful in this respect that NAFTA jurisprudence is not at one in answering the question of how time concerning continuing and composite acts should be computed " and eventually refused the continuous breach exception, at para. 208).

[39] See *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, para. 322 ("The Tribunal notes that the traditional position in investment arbitration, in contrast to commercial arbitration, has been to follow the public international rule which does not apply the principle that the loser pays the costs of the arbitration and the costs of the prevailing party"). By contrast to *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 533 ("[T]he Tribunal can find no reason to depart from the starting point that the successful party should receive reimbursement from the unsuccessful party "). See also *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006, para. 107 ("Though aware of a common practice in ICSID arbitrations for the parties to bear their own costs and bear the costs of ICSID and the tribunal equally regardless of the outcome of the case, this Tribunal is among those who favour the general principle that costs should follow the event"), the two different approaches have been recalled in the *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Final Award, 31 May 2017, at para. 583, without being reconciled.

[40] *Tenaris S.A. and Talta — Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26 which views the stay as exceptional; *Tenaris S.A. and Talta — Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23, viewing a grant of stay as normal absent unusual circumstances.

[41] Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 Fordham L. Rev. 1521 (2005).

23. Another option is challenging an arbitral award on a limited number of grounds. However, arbitral awards are final and subject to review only in set-aside applications or enforcement procedures in domestic courts and, in the case of ICSID awards, in annulment proceedings. Because of the notion of finality, remedies against awards are by nature limited.

24. In the ICSID system, the procedure for the annulment of arbitral awards is based on assessment of the integrity of the procedure itself, and does not affect the substance of the dispute by reconsidering the resolved case. The grounds on which annulment may be requested are prescribed in a limitative manner indicating the main feature of this process: it is designed to be an exception, and to be used very narrowly, based on strictly defined grounds.

25. It may be noted that there have been inconsistencies in applying the annulment grounds in the ICSID context. The first generation of annulment decisions[42] were criticized for having adopted an overly expansive view of the scope and standard of review.[43] Later decisions were seen to have corrected this.[44] More recently, decisions have reintroduced inconsistency into the annulment process — in part because of differing views on whether a misinterpretation of the relationship between an investment treaty and customary international law constitutes grounds for annulment.[45] Some committees have concluded that serious misapplication of the law may lead to annulment, where others have considered that such an approach would amount to an appeal.[46] The Working Group may wish to note the recent proposals for amendment of the ICSID Rules of Procedure for Arbitration Proceedings.[47]

26. In non-ICSID cases, annulment of awards as well as enforcement proceedings will take place in State courts. Here also, the process focuses essentially on compliance with fundamental rules of procedure, and does not include a review of the merits, based on the principle that arbitral awards are final and binding once rendered. The system applies to both commercial and investment arbitration.

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[42] *Klockner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Ad hoc Committee Decision on Annulment, 3 May 1985; *Amco Asia Corporation and others v Republic of Indonesia*, ICSID Case No. ARB/81/1, Ad hoc Committee Decision on the Application for Annulment, 16 May 1986.

[43] W. Michael Reisman, *Repairing ICSID's Control System: Some Comments on Aron Broches - Observations on the Finality of ICSID Awards* (1992) 7 ICSID Review - Foreign Investment Law Journal 196.

[44] *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision of the Ad hoc Annulment Committee partially annulling the Award, 22 December 1989; *Klockner Industrie- Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Second ad hoc Committee Decision rejecting the application for annulment, 17 May 1990; *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Second Annulment Request (17 December 1992).

[45] *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007; *Sempra Energy International v. The Republic of Argentina*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010; *Enron Creditors Recovery Corporation and Ponderosa Assets L.P. v. The Republic of Argentina*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010; *Helnan International Hotels A/S v Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the ad hoc Committee, 14 June 2010.

[46] See Nicholas Fletcher, *Should ICSID have or not a new appellate process? Contemporary Issues in International Arbitration and Mediation*, The Fordham Papers 2015.

[47] See ICSID Secretariat, Proposals for Amendment of ICSID Rules — Working Paper, August 2, 2018, pp. 270–289, available at https://icsid.worldbank.org/en/Documents/Amendments_Vol_Three.pdf.

C. Desirability of reform

27. The Working Group may wish to note that the questions below are also discussed in document A/CN.9/WG.III/WP.149, which provides a general framework for considering the desirability of reforms.

1. General comments

(a) Questions for consideration

28. The need for consistency and coherence relates to the need for certainty, predictability, and equal treatment. At the thirty-fourth session of the Working Group, predictability and correctness were said to be values that support the rule of law, enhance confidence in the stability of the investment environment, further bring legitimacy to the regime, and contribute to the development of investment law (A/CN.9/930/Add.1/Rev.1, para. 11). A consequence of predictability mentioned in the Working Group was that it would allow States to understand whether their actions, such as possible future legislative or regulatory activities, might breach their obligations. In this regard, it was said that predictability would assist States in setting their investment policies. Predictability would also allow investors to assess whether certain treatment was in accordance with treaty obligations (A/CN.9/930/Add.1/Rev.1, para. 15). Indeed, investment arbitrations frequently address the scope of the regulatory powers of the host States. Delegations confirmed that they had undertaken consultations with their various constituents and stakeholders. The outcome of the consultations as reported was that predictability was important to investors as well, in that lack of predictability could constitute a risk factor for investors and so inhibit investment. It was added that investors valued a dispute settlement system that ensured predictability, given the costs involved (A/CN.9/935, para. 37).

29. Given the characteristics of the investment treaties and ISDS, an issue raised in the Working Group was the desirability of, and the need for, more predictability of outcomes as well as increased uniformity and harmony in the evolution of jurisprudence (A/CN.9/930/Add.1/Rev.1, para. 16; A/CN.9/935, paras. 34–38).

30. In this regard, the Working Group may wish to consider whether the very nature of investment law and the fact that investment law and investment protection standards are fragmented in different sources of law, including numerous investment treaties and domestic regimes, mean that the method of resolving investment disputes must play a central role in the development of consistent legal standards. The Working Group may also wish to consider whether the need in ISDS for decision makers to apply a body of rules that is less developed and still in the process of being formed, means that their decision will have greater impact on the establishment of predictable rules and the development of consistent legal standards in the future.[48]

31. The Working Group may also wish to bear in mind the ultimate objective of investment treaties and investment laws to foster foreign investment flows among countries of a kind and type that meets sustainable development goals, and consider, beyond the impact of inconsistency and lack of predictability on States signatories to the investment treaties, the impact on foreign investors and assessment of the political and economic risks associated with an investment abroad.

(b) Preliminary views expressed by States

32. At its thirty-fourth and thirty-fifth sessions, the Working Group heard some preliminary views regarding how inconsistency and incoherence could be addressed so as to enhance predictability of the ISDS framework. Suggestions included the following: amending investment treaties that contained vague wording; providing solutions to give greater control by State parties to investment treaties, such as joint

[48] Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?* The 2006 Freshfields Lecture

interpretative statements and guidelines on interpretation of standards, non-disputing party submissions to allow other member States to provide their views about the interpretation of a standard, a mechanism through which tribunals could direct questions to the treaty partners prior to the issuance of awards; adopting a systemic approach through institutional solutions (appeal mechanisms or permanent adjudicatory bodies); considering reforming the domestic framework on investment, including substantive standards of protection contained in domestic laws; introducing or implementing a system of precedents; encouraging consolidation where possible, as well as coordination among tribunals; improving the existing review mechanisms and annulment procedures; and enhancing the role of domestic courts (A/CN.9/930/Add.1/Rev.1, para. 34; and A/CN.9/935, para. 43).

33. Certain solutions listed above would be for States to implement, either through their treaty drafting or through treaty actions. In its World Investment Report, 2017, UNCTAD lists ten options for reforms that States can undertake. [49]

34. For instance, what are termed "second-generation" treaties have better circumscribed the scope of various standards as compared with their "first-generation" counterparts, which contain vague formulations, susceptible to different interpretations (A/CN.9/935, para. 28). The second-generation treaties have brought more clarity in substantive protection standards and in procedural provisions. States may therefore wish to consider negotiating new investment treaties or negotiating amendments to existing ones. As a general comment, States may consider using the above study of inconsistencies as a "map" of issues where their intended policy outcome may be shaped by more clearly defining procedural or substantive requirements. However, the Working Group may wish to consider the time required for this approach, and whether it is a viable solution for the many first-generation treaties.

35. In addition, States may consider the issuance of detailed and, possibly mandatory, guidance for arbitral tribunals. Examples include binding interpretations or the use of other procedural tools, such as submissions from non-disputing treaty Parties (A/CN.9/930/Add.1/Rev.1, paras. 22 and 23). [50] In the past, such interpretations have been issued ad hoc, or based on an institutionalized forum or standing committee for consultation (for instance, the NAFTA standing body composed of representatives of Governments of the three member States, which can issue binding notes of interpretation for NAFTA Chapter XI tribunals). Certain investment treaties also foresee that some questions should be raised with the States parties to the investment treaty in order to receive their joint interpretations. [51]

36. Further, the Working Group may wish to consider the effectiveness of such guidance and, in particular, the relationship between those State statements and arbitral tribunals' subsequent interpretations of the standards. [52]

2. Possible reforms on a multilateral basis

(a) Introducing a system of precedent

37. From an historical viewpoint, consistency and coherence are not features built in to the ISDS regime. Decisions are made by arbitral tribunals established on an ad hoc basis, with no formal obligation with regard to the principle of precedent.

38. The Working Group may wish to consider that "consistency", "coherence", and "predictability" of decisions in ISDS would, in most cases, mean that decision makers

[49] UNCTAD, World Investment Report 2017, at p. 131, available on the Internet at http://unctad.org/en/PublicationChapters/wir2017ch3_en.pdf.

[50] See also UNCTAD IIA Issues Notes, No. 3, December 2011, *Interpretation of IIAs: What States can do*, UNCTAD Series on Issues in International Investment Agreements II, Investor-State Dispute Settlement: A Sequel, 2014.

[51] See the treaty between Uruguay and the United States of America, article 31.

[52] See, for instance, Dominican Republic-Central America Free Trade Agreement (DR-CAFTA) where the treaty provides that a joint interpretation shall be binding on arbitral tribunals.

take into account pre-existing case law and conform to the extent possible or desirable to the legal interpretations set out therein. It would also imply that a tribunal, in the event it considers that the interpretative approaches and legal reasoning in a previously rendered decision do not apply to the instant case, may adopt a different position on the basis of a reasoned explanation. In a "coherent" and "predictable" system, conflicting decisions would be based upon a consistent interpretative approach to the issues at stake, extending beyond the instant case, and one that takes into account pre-existing case law and contributes to the development of investment law and jurisprudence.

39. Despite the diversity of investment treaties, patterns of consistent interpretation of the common denominators of recurring provisions may be established, and core standards and principles may thus be clarified through consistent and coherent interpretation (A/CN.9/930/Add.1/Rev.1, para. 16). It may be noted in that respect that the transparency standards in ISDS, as designed by ICSID in 2006, and by UNCITRAL in 2013 and 2014, foresee access to orders and decisions by arbitral tribunals. With the use of such standards and publication of ISDS decisions, arbitral tribunals will more easily gain access to earlier decisions, which would contribute to promoting a system of precedent.

40. Currently, while tribunals seem to agree that there is no doctrine of binding precedent per se, they also concur on the need to consider earlier cases. Awards frequently express the tribunal's conviction that it must pay due regard to earlier decisions of international courts and tribunals and that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent decisions.[53] Nonetheless, this has not always secured consistency among arbitral awards as this approach is difficult to implement in a decentralized mode of decision-making, composed of ad hoc tribunals only.[54] Also, certain tribunals, while acknowledging that consistency is generally desirable, have stressed that "*[t]here is no hierarchy of international tribunals, and even if there were, there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals*".[55] If the Working Group considers that a system of binding precedent should be introduced, it

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[53] See, for instance, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, para. 187 (recording an individual arbitrator's view that there is no duty to follow jurisprudential trends, but providing that "[T]he Tribunal believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It further believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law, and thereby to meet the legitimate expectations of the community of States and investors towards the certainty of the rule of law").

[54] By comparison, in the International Court of Justice, there is no de jure *stare decisis* (see Article 59 of the ICJ Statute); there is, however, a strong reliance on earlier judicial decisions, which are listed as "subsidiary means for the determination of rules of law" in Article 38 of the ICJ Statute, and practice shows that past decisions are highly persuasive to the court.

[55] See *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, 29 January 2004, para. 97 ("The ICSID Convention provides only that awards rendered under it are "binding on the parties" (Article 53(1)), a provision which might be regarded as directed to the res judicata effect of awards rather than their impact as precedents in later cases. In the Tribunal's view, although different tribunals constituted under the ICSID system should in general seek to act consistently with each other, in the end it must be for each tribunal to exercise its competence in accordance with the applicable law, which will by definition be different for each BIT and each Respondent State. Moreover there is no doctrine of precedent in international law, if by precedent is meant a rule of the binding effect of a single decision. There is no hierarchy of international tribunals, and even if there were, there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals."). See also *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, para. 224 ("This Tribunal is required to decide the arguments advanced by the Parties in this arbitration based on the evidence adduced by the Parties in these proceedings. It cannot be influenced therefore by the result of a different arbitration, where an investor's claim appears to have been formulated differently and decided on different arguments and evidence").

may wish to consider the feasibility of implementing such solution given the characteristics of the ISDS regime.

41. Despite being primarily responsible for rendering decisions on the matters submitted to them, arbitral tribunals also operate in the framework of a larger adjudicatory system with public relevance. Indeed, investment treaty tribunals contribute to articulating and clarifying the meaning of core treaty standards.[56] Therefore, a related question is whether it should be considered that arbitrators are under a general duty towards an international system of justice, to act in the public interest (A/CN.9/935, paras. 85 and 86), and if so, how to implement such duty (see also, on that matter, document A/CN.9/WG.III/WP.153).

(b) Providing guidance to arbitral tribunals

42. There are a number of procedural mechanisms that arbitral tribunals can use or be encouraged to use in order to coordinate better their decision-making, including in situations of concurrent proceedings. These tools are described in document A/CN.9/915, paras. 10–33. They include various approaches, such as proactive use of consolidation, exchange of information, stay of proceedings, as well as use of doctrines of *lis pendens* and *res judicata*.

(c) Prior scrutiny of arbitral awards

43. A system allowing for prior scrutiny of draft arbitral awards could also be considered. Scrutiny of awards is a feature of the Rules of the ICC International Court of Arbitration, which has often been described as beneficial in that it enhances quality and enforceability of the awards. A similar system could be designed to ensure consistency, avoid legal mistakes and ensure quality of awards rendered by ISDS tribunals.

(d) Appellate mechanism

44. Illustrations of the Parties' intention to include appellate review mechanisms can be found in certain investment treaties.[57]

45. A further option often cited is the creation of a standalone appellate mechanism. The main functions of an appellate body is to ensure procedural and substantive correctness of decisions. It would be tasked with a substantive review of decisions, and would permit implementation of a system of binding precedent.[58] The scope of review by an appellate mechanism would need to be circumscribed to avoid de novo review.

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[56] See *Glamis Gold Ltd. v. United States of America*, UNCITRAL Arbitration (NAFTA), Award, 8 June 2009, at para. 7, where the tribunal provided as follows: "this Tribunal, in undertaking its primary mandate of resolving this particular dispute, does so with an awareness of the context within which it operates. The Tribunal emphasizes that it in no way views its awareness of the context in which it operates as justifying (or indeed requiring) a departure from its duty to focus on the specific case before it. Rather it views its awareness of operating in this context as a discipline upon its reasoning that does not alter the Tribunal's decision, but rather guides and aids the Tribunal in simultaneously supporting the system of which it is only a temporary part." See also *Saipem S.p.A v. The People's Republic of Bangladesh*, ICSID Case N0. ARB/05/07.

[57] See, for instance, the Treaty between the United States of America and the Oriental Republic of Uruguay concerning the Encouragement and Reciprocal Protection of Investment, 4 November 2005 (entry into force 1 November 2006), Annex E, the Free Trade Agreement between the Government of the Republic of Chile and the Government of the United States of America, 6 June 2003 (entry into force 1 January 2004), Art. 10.19 (10) and Annex 10-H, the Dominican Republic-Central America Free Trade Agreement, 5 August 2004, the Canada-European Union Comprehensive Economic and Trade Agreement (CETA), at article 8.28.

[58] See also ICSID-Secretariat, Discussion Paper "Possible Improvements of the Framework for ICSID Arbitration (22 October 2004), available at https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents.

(e) System of preliminary rulings

46. Under this option, arbitral tribunals should be allowed to refer any question concerning the application and interpretation of a legal matter to a specific body.

(f) Setting up an international court system

47. Certain recent investment treaties have foreseen the creation of a court, set up as a permanent international institution.[59] The rationale is that by sitting permanently and deciding cases over time, judges would deliver consistent decisions.

[59] See for instance, the Canada-European Union Comprehensive Economic and Trade Agreement (CETA), the European Union-Viet Nam Free Trade Agreement

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Possible reform of investor-State dispute settlement (ISDS)

Ensuring independence and impartiality on the part of arbitrators and decision makers in ISDS

Note by the Secretariat

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I. Introduction

1. At its 35th session, the Working Group suggested that the Secretariat (i) prepare a list of the concerns about investor-State dispute settlement (ISDS) raised during its thirty-fourth and 35th sessions; (ii) set out a possible framework for its future deliberations; and (iii) consider the provision of further information to assist States with respect to the scope of some concerns (A/CN.9/935, para. 99).

2. Document A/CN.9/WG.III/WP.149 addresses items (i) and (ii) at an overview level. Documents A/CN.9/WG.III/WP.151 (this Note) and A/CN.9/WG.III/WP.152 address the requests of the Working Group on the topic of arbitrators and decision makers in ISDS.

3. As is the case for other documents provided to the Working Group, this Note was prepared with reference to a broad range of published information on the topic.[1]

4. While this Note provides information to assist the Working Group in its consideration of certain concerns in ISDS and the desirability of reforms, it does not seek to express a view on the issues raised, which is a matter for the Working Group to consider.

II. Ensuring independence and impartiality on the part of arbitrators and decision makers in ISDS

A. Assessment of identified concerns

1. Overview of identified concerns

5. At its 35th session, the Working Group considered the question of arbitrators and decision makers in ISDS, including ethical requirements of which the main areas are independence and impartiality of arbitrators (A/CN.9/935, paras. 47–68 and 78–81), the impact of the appointment mechanisms (A/CN.9/935, paras. 54 and 69–77), and the qualifications and powers of arbitrators (A/CN.9/935, paras. 82–88).

6. In particular, the Working Group considered the causes of criticisms of the current ISDS regime as regards arbitrators, so as to assist in considering possible solutions in due course (A/CN.9/935, para. 55). In that context, the concerns raised included the following:

(i) The lack of precise definition of the relevant ethical requirements and of their scope in practice (A/CN.9/935, para. 56), as well as conflicts of interest, so-called double-hatting and/or issue conflicts resulting from the fact that arbitrators can also act as counsel in different ISDS proceedings (A/CN.9/935, paras. 78–81);

(ii) The appointment mechanisms and process, the impact of the role of arbitrators in ISDS cases (including the question of democratic accountability of arbitrators, A/CN.9/935, para. 58), whether more transparency would be needed in the appointment process, in particular where appointing authorities are involved (A/CN.9/935, paras. 76–77), and the impact of appointment mechanisms on diversity (A/CN.9/935, paras. 69–75);

(iii) The method of remuneration of arbitrators, which is often considered as a core element of independence, though the Working Group noted that less attention has been devoted to the question than other issues raised regarding arbitrators (A/CN.9/935, para. 57);

[1] See bibliographic references published by the Academic Forum, available under "Additional resources" at http://www.uncitral.org/uncitral/en/publications/online_resources_ISDS.html. The preparation of this Note also benefited from contributions by the following experts: Susan Franck, Jean Kalicki, Joost Pauwelyn, Sergio Puig and Maxi Scherer.

(iv) The qualifications required to adjudicate on ISDS cases and the powers and duties of arbitrators (A/CN.9/935, paras. 82–88); and

(v) The impact on independence and impartiality of the practice of third-party funding (A/CN.9/935, paras. 82–88).

7. This Note addresses the concerns considered by the Working Group regarding the efficacy of the existing legal framework in guaranteeing independence and impartiality of arbitrators, including disclosure requirements and challenge mechanisms. The appointment process and mechanisms and their impact and the question of arbitrators' qualifications and powers are addressed in document A/CN.9/WG.III/WP.152. A forthcoming Working Paper will address third-party funding.

8. At its 35th session, the Working Group suggested that information on other legal frameworks on independence and impartiality should be made available to the Working Group, including international commercial arbitration and international courts and tribunals (A/CN.9/935, para. 46). This Note includes information regarding these "comparators" and provides commentary on the relevance and reliability of information and data on individual issues, where appropriate.

2. Legal framework on independence and impartiality

(a) Requirements of independence and impartiality

(i) Notions of independence and impartiality[2]

9. Independence and impartiality of the adjudicator are key elements of any system of justice, meant to ensure fair trial and compliance with due process requirements. The Working Group emphasized that sufficient guarantees of independence and impartiality on the part of arbitrators is essential in ISDS (A/CN.9/935, para. 47).

10. A widely held view in the Working Group was that, in order to be considered effective, the ISDS framework should not only ensure actual impartiality and independence of arbitrators and decision makers, but also the appearance of those qualities. The view was expressed that efforts should therefore include both elements (A/CN.9/935, para. 53).

11. The most widespread conception of independence and impartiality is that they are distinct, but closely related, concepts. While independence usually relates to the lack of a business, financial, or personal relationship between an arbitrator and a party to the arbitration, impartiality means the absence of bias or predisposition of the arbitrator or decision maker towards a party. Lack of independence usually derives from problematic relations between an arbitrator and a party or its counsel and lack of impartiality would arise, for instance, if an arbitrator appears to have pre-judged some matters.

[2] The Working Group may wish to note that the focus of this Note, as in the discussions in the Working Group, is on the independence and impartiality of arbitrators. However, other requirements upon arbitrators — including neutrality, fairness to the parties, diligence and confidentiality can be found in national legislation and arbitration rules. In substance, these rules require the arbitrator to: (i) perform his or her duties with fairness and diligence, thoroughly and expeditiously during the course of the proceeding; and (ii) keep non-public information confidential, and not use any information to gain a personal advantage, or to affect the interest of others. Examples are Rule 6 of the ICSID Convention and article 17 of the UNCITRAL Arbitration Rules.

12. The requirements of independence and impartiality apply to any judicial or judicial-like dispute settlement process.[3]

13. The process to appoint arbitrators and decision makers has the potential to create relationships between the appointing party and the arbitrator and decision maker. The context and impact of the appointment process in various arbitral and judicial systems are discussed in A/CN.9/WG.III/WP152.

14. When considering the notion of independence, a distinction is usually made between individual independence, meaning the absence of connection between a party and the decision maker, sometimes also called functional independence (as it relates to the function of the decision maker); and institutional independence, meaning the absence of external influence on a dispute settlement body.

15. Arbitrators commonly engage in other professional activities, which can give rise to connections with the disputing parties and the dispute and may have a bearing on individual independence, which is the main area of focus in the ad hoc ISDS context.[4] Nonetheless, institutional independence is still relevant. In institutional arbitration, for example, the institutional set-up must guarantee structural independence (that is, that the institutions do not intervene in the adjudication of the dispute). While arbitral institutions in ad hoc systems generally rely primarily on the individual independence of the adjudicators from the disputing parties and the subject-matter of the dispute, the same principle of institutional independence applies.

[3] The requirements apply to domestic courts, to international commercial arbitration, to investment arbitration, to inter-State arbitration, and to the international judiciary. They reflect fundamental principles, see e.g. Universal Declaration of Human Rights, 10 December 1948, United Nations Doc. A/810 at 71 (1948), Art. 10 ("Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him"), International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, Art. 14(1) ("All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. [...]"), ECHR, Art. 6(1) ("In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"), the statutes of various international judicial bodies reflect requirements of independence and impartiality, see Bangalore Principles of Judicial Conduct (2002), available at http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf. The standards are included in judges' oaths of office; the ITLOS Statute, which sets out the oath in the following terms: "I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously." Also, the United Nations Basic Principles on the Independence of the Judiciary and the "Burgh House Principles on the Independence of the International Judiciary", which are non-binding principles designed to apply primarily to standing international court, set out general guidelines on independence and impartiality as follows: "To ensure the independence of the judiciary, judges must enjoy independence from the parties to cases before them, their own states of nationality or residence, the host countries in which they serve, and the international organizations under the auspices of which the court or tribunal is established. Judges must be free from undue influence from any source. Judges shall decide cases impartially, on the basis of the facts of the case and the applicable law. Judges shall avoid any conflict of interest, as well as being placed in a situation which might reasonably be perceived as giving rise to any conflict of interests, and Judges shall refrain from impropriety in their judicial and related activities." (Available at https://www.ucl.ac.uk/international-courts/sites/international-courts/files/burgh_final_21204.pdf.)

[4] By contrast, the statutes of international courts and tribunals proceed on an assumption, for the most part, that the judges are engaged on a full-time basis. Consequently, their approach to non-judicial activity and relationships is grounded in circumstances that are different from ISDS

(iii) Existing standards

16. In the field of ISDS, the ICSID and UNCITRAL Rules,[5] as well as institutional rules of other relevant bodies,[6] focus on (i) setting out the principle that arbitrators shall be independent and impartial; (ii) providing rules for the prevention of dependence and bias by requiring arbitrators to make certain disclosures regarding issues that might raise questions about their independence or impartiality; and (iii) defining procedures for parties to challenge arbitrators based on real or apparent lack of independence or impartiality, which are the focus of this section.

17. The Working Group may wish to note that independence and impartiality under the arbitration rules mentioned above are defined as duties for arbitrators who are required to make decisions free of external interferences and bias. Independence is also an entitlement of an arbitrator, as no entity or person may interfere with, or influence, an arbitrator.

18. Soft law standards have been developed to complement applicable rules. For instance, the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration (the "IBA Guidelines") set out a general principle of independence and impartiality.[7] They also provide that each potential arbitrator is responsible for assessing potential conflicts of interest or possible bias and for disclosing those matters.[8]

19. Some recently concluded investment treaties contain a code of conduct for arbitrators acting in investor-State dispute settlement arising under that treaty, thereby complementing the provisions of the applicable arbitration rules.[9] Those codes usually address the standards of conduct for arbitrators (and other persons), their duties in the conduct of the arbitration, the disclosure obligations and the obligations of confidentiality. They usually do not provide for sanctions, other than the right of both parties to demand replacement of the arbitrator.

20. The Dispute Settlement Understanding of the World Trade Organization (WTO DSU) and WTO Rules of Conduct require WTO DSU members (among other relevant persons) to be "independent and impartial, shall avoid direct or indirect conflicts of interest …, so that through the observance of such standards of conduct the integrity and impartiality of that mechanism are preserved."[10]

(iii) Additional Specific issues or concerns

21. Certain issues have been identified in the context of ISDS as at particular risk of raising a lack of independence and impartiality or as raising concerns thereof.

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[5] Article 14 (1) of the ICSID Convention, Rule 6(2) ICSID Arbitration Rules, Article 11 Of the UNCITRAL Arbitration Rules. The difference in the wording of the requirements for independence and impartiality in the above arbitral rules is also considered not to indicate differing standards. There is general agreement that the rules encompass both independence and impartiality requirements (for example, the ability to exercise independent judgment can be seen as an alternative way of phrasing impartiality).

[6] See also the Permanent Court of Arbitration, Arbitration Rules 11–13, The Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, in force as of 1 January 2017, Article 15, the Rules of Arbitration of the International Chamber of Commerce, in force as from 1 March 2017, article 11, Cairo Regional Centre for International Commercial Arbitration, Arbitration Rules in force as from 1 March 2011, article 11

[7] They provide that "every arbitrator shall be impartial and independent at the time of appointment and shall remain so until the final award has been rendered or the proceedings have otherwise terminated". The IBA Guidelines are available at https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx

[8] See Guideline 7 d, available as above

[9] See, for instance the European Union-Singapore Free Trade Agreement (Annex 15-B, Code of Conduct for Arbitrators and Mediators, version as of May 2015), and Canada-European Union Comprehensive Economic Trade Agreement (CETA) (Annex 29-B, Code of Conduct for Arbitrators and Mediators)

[10] "Rules of conduct for the understanding on rules and procedures governing the settlement of disputes", 1996, available at https://www.wto.org/English/tratop_e/dispu_e/rc_e.htm

These include repeat appointments, and situations of conflicts of interest and/or so-called issue conflicts.

Repeat appointments

22. The question of repeat appointments was considered by the Working Group at its 35th session. It was said that some arbitrators are commonly characterized as pro-State or pro-investor, based on this proxy of repeat appointments by one or other party (A/CN.9/935, para. 54). Another aspect of repeat appointments arises where the same arbitrator is appointed in similar circumstances (e.g. by different States but in disputes raising similar legal issues). It is however difficult to determine the impact of repeat appointments in fact on independence and bias on the part of the arbitrator, and whether they in fact reflect ideology or policy preferences, particularly as regards any impact on outcomes.

23. In one ICSID case, repeat appointments of themselves were not considered to indicate lack of independence, even when similar legal and factual issues arose.[11] The decision in another case, however, held that "multiple appointments of an arbitrator by a party or its counsel constitute a consideration that must be carefully considered in the context of a challenge".[12] The economic significance of the appointments to the arbitrators concerned and whether they indicate arbitrator dependence on the party, whether the repeat appointments are such that a prior relationship arises, and whether overlapping issues of law and fact are raised are also to be taken into consideration.

24. The IBA Guidelines include repeat appointments by parties and counsel on its "Orange List".[13] The Guidelines suggest that justifiable doubts do not arise unless "[t]he arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties" or "[t]he arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm". However, the Guidelines provide an exception to these parameters for repeat appointments in specialized fields of arbitration where it is the practice for parties to repeatedly appoint the same arbitrator in different cases.[14]

Double-hatting or role confusion

25. One issue that has been the subject of significant controversy when it comes to the question of independence and impartiality of arbitrators is the switching of roles between individuals acting as arbitrator, counsel and expert in different ISDS proceedings, with the possibility of ensuing conflicts of interest and/or so-called issue

[11] ICSID cases Tidewater Inc. and others v. Bolivarian Republic of Venezuela, ARB/10/5, Decision on Claimant's Proposal to Disqualify Professor Brigitte Stern, Arbitrator, December 23, 2010.

[12] Opic Karimum Corporation v. Bolivarian Republic of Venezuela, Decision on the Proposal to Disqualify Professor Philippe Sands, ICSID Case No. ARB/10/14 (May 5, 2011).

[13] The Guidelines set out four categories of Application Lists that categorise potential conflicts that must be disclosed, of which the first is the "Red List". The Red List has two sub-categories: first, the Non-Waivable Red List, which sets out the most serious conflicts and, as the title of the sub-category indicates, cannot be cured by a waiver from the parties. Secondly, the Waivable Red List, containing situations that give rise to justifiable doubts as to an arbitrator's independence and impartiality, but which can be waived by parties (with the caveats that the waiver is express and is based on relevant knowledge). The "Orange List" provides a non-exhaustive list of situations that are generally not subject to disclosure, but an arbitrator must assess on a case-by-case basis whether a given situation (whether or not specifically listed under the Orange List) can nevertheless give rise to justifiable doubts as to his or her impartiality. Finally, the "Green List" sets out situations where no conflict of interest is considered to exist (whether actual or perceived), and thus there is no requirement for disclosure in those situations.

[14] On the other hand, in international commercial arbitration, the economic importance of the appointments to the arbitrator, rather than the number of appointments over a certain time-period, has been taken as an indicator. See, for example, LCIA Reference No. 81160 (August 28, 2009).

conflicts.[15] These situations raise concerns in that arbitrators have the possibility of deciding on, or appearing to decide on, an issue in one manner so as to benefit a party that they represent in another dispute. Further, a counsel may agree to appoint a particular arbitrator in one case, and this arbitrator, when acting as counsel in another case, agrees to appoint the appointing counsel as arbitrator in that second case.

26. At the 35th session of the Working Group, there was general agreement that this practice, often termed "double-hatting" or "role confusion", raised a concern to the extent that it created a potential or actual conflict of interest. The Working Group heard at that session that such conflicts, or even the suspicion that cases are decided as a result of these influences, have a negative impact on the perception of the legitimacy of ISDS (A/CN.9/935, paras. 78 and 81). The concerns about double-hatting had been stated to be particularly acute in ISDS in that the interpretation and application of the same or similar legal instruments are regularly at issue.

27. On the other hand, arguments raised in the Working Group in favour of permitting the practice include that the relatively small pool of ISDS arbitrators is such that prohibiting double-hatting would undermine the quality and rigour of the decision makers in the current system.[16] Another is that, as the Working Group heard at the 35th session, counsel seeking to become full-time arbitrators cannot for economic reasons cease their practice as counsel while there is no guarantee of arbitral appointments, and that service as counsel can allow for the would-be arbitrators to gain the experience and reputation necessary for arbitral appointments to follow (A/CN.9/935, para. 81).

28. While noting that States had attempted to address the question in more recent investment treaties as the 35th session, the Working Group requested additional information on the extent of the practice, so as to delineate the scope of the issue and understand its nature (A/CN.9/935, para. 81).

29. Domestic legislation in general does not ban the practice of double-hatting and nor do the rules of ICSID and UNCITRAL prohibit it. The matter is also not addressed in the IBA Guidelines. Consequently, whether double-hatting raises conflicts of interest in practice is assessed in challenges to arbitrators by reference to the general standard in challenges: are there justifiable doubts, or another applicable test, as to whether it indicates a lack of independence and impartiality on the facts of the case concerned?

30. In addition, very few, if any, standards on ethics directly discuss the permissibility or otherwise of multiple roles of this type. There are, however, some indirect references within certain codes that can be read to allow or limit multi-roles in various international courts and organizations.[17]

31. In the context of international courts and tribunals, Burgh House principle 8.1 states that "[j]udges shall not engage in any extra-judicial activity that is incompatible with their judicial function or the efficient and timely functioning of the court of which they are members, or that may affect or may reasonably appear to affect their independence or impartiality".[18] Article 16 of the Statute of the International Court of

[15] An illustration of role confusion are the interlinkages in the cases of Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12 (Disqualification decision is not publicly available), Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, (Disqualification decision is not publicly available), and Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19.

[16] It has been suggested, however, that the pool has expanded since these arguments were first raised. See, further, the Pluricourts Study discussed in paras. 32 et seq. below.

[17] See for instance, Section 18 of the CAS Code on Arbitration which provides: "The personalities who appear on the list of arbitrators may be called upon to serve on Panels constituted by either of the CAS Divisions." Upon their appointment, the CAS arbitrators and mediators sign a declaration undertaking to exercise their functions personally with total objectivity and independence, and in conformity with the provisions of this Code. CAS arbitrators and mediators may not act as counsel for a party before the CAS.

[18] For information on the Burgh House Principles, see footnote 3 above.

Justice (ICJ) bans members of the Court from obtaining and acting in certain roles. [19] The ICC Statute provides that "[j]udges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence,"[20] and, indeed, and that "[j]udges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature." Judges of the ECHR, similarly, "shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office".[21]

32. The World Trade Organization (WTO) has a provision that takes a rather different approach from that in the statutes and codes of other international tribunals and organizations. In Article 8 of the WTO Understanding on Rules and Procedures Governing the Settlement of Dispute (DSU), there is a preference for a potential panellist who has previously acted as counsel in front of a WTO Panel.[22] This is the most explicit example of allowing and even encouraging some sort of multi-roles. However, the language of the statute itself does not clarify whether or not the panellist may subsequently continue to practice as counsel in front of WTO Panels.

33. In one well-reported challenge decision based on double-hatting in ISDS, an appearance of bias or conflict in the context of double-hatting was deemed sufficient to merit disqualification.[23] The case was resolved in fact through the resignation of the individual concerned as counsel in one of the cases at issue, and it does not therefore provide guidance on the extent of conflict that would lead to disqualification.

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[19] Statute of the International Court of Justice art. 16.1, June 26, 1945, 59 Stat. 1055 (proclaiming that "[n]o member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature. 2. Any doubt on this point shall be settled by the decision of the Court"). The ICJ has addressed double-hatting in two Practice Directions issued in 2002. Practice Direction VII: "The Court considers that it is not in the interest of the sound administration of justice that a person sits as judge ad hoc in one case who is also acting or has recently acted as agent, counsel or advocate in another case before the Court. Accordingly, parties, when choosing a judge ad hoc pursuant to Article 31 of the Statute and Article 35 of the Rules of Court, should refrain from nominating persons who are acting as agent, counsel or advocate in another case before the Court or have acted in that capacity in the three years preceding the date of the nomination. Furthermore, parties should likewise refrain from designating as agent, counsel or advocate in a case before the Court a person who sits as judge ad hoc in another case before the Court", and Practice Direction VIII: "The Court considers that it is not in the interest of the sound administration of justice that a person who until recently was a Member of the Court, judge ad hoc, Registrar, Deputy-Registrar or higher official of the Court (principal legal secretary, first secretary or secretary), appear as agent, counsel or advocate in a case before the Court. Accordingly, parties should refrain from designating as agent, counsel or advocate in a case before the Court a person who in the three years preceding the date of the designation was a Member of the Court, judge ad hoc, Registrar, Deputy-Registrar [etc.] ..." The impact of these Practice Directions has not been to prevent ICJ judges entirely from acting as arbitrators in ISDS. A study found that seven of the ICJ's 15 members, as at 2017, have worked as arbitrators during their tenure, in at least 90 cases, that three of those judges each worked as arbitrators in nine cases, and the remaining four judges were identified as arbitrators in only one or two cases each, and that several current judges also worked on annulment committees. Finally, the study found that sitting ICJ judges have sat or are sitting as arbitrators in nearly 10 per cent of the 817 known investment treaty cases (see http://www.tni.org/media/sitting-international-court-justice-judges-worked-arbitrators-least-90-investor-state-cases).

[20] Article 40(2).

[21] Rule 4, Rules of Court of the European Court of Human Rights (2018), available at https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf.

[22] UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES, Art. 8 (WORLD TRADE ORG.) ("Members shall undertake, as a general rule, to permit their officials to serve as panellists"). Art. 8 provides "Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement ...")

[23] Telekom Malaysia Berhad v. The Republic of Ghana, PCA Case No. 2003-03.

34. In a 2017 study, based on 1,039 cases in the databases of Pluricourts and ICSID,[24] the relationships between 3,910 individuals were analysed. The findings on double-hatting can be summarized as follows. First, that the practice of double-hatting is prevalent among a small but highly-influential group of arbitrators (25 individuals, and particularly so for a sub-group of 5 individuals within that group), but it is not widespread across the entire spectrum of ISDS cases (and not as widespread as may be perceived). Secondly, double-hatting for the "top 25" individuals has been relatively stable since 2005, though for other individuals, it rose sharply in 2014 but has since declined. Third, that those that have ceased double-hatting in the last four years appear to have done so as they reach retirement age. Other reasons posited for post-2014 reductions include having a sufficiently large caseload as arbitrator to preclude serving as counsel, or being appointed as a judge to the ICJ. Consequently, it is suggested that criticism of the practice was not a motivating factor in recent reductions, and the recent reductions may not provide reliable indicators for the future. A fourth finding is that some prominent arbitrators have expressly declared that they will not engage in the practice. The data used for the 2017 study also indicated that the potential pool of investment arbitrators has expanded considerably since the 1990s. There appears to be no comparable publicly-available study on the scope and extent of the "revolving door" (sequential appointments as arbitrator and counsel) or other issue conflicts.

Pre-judgment of issues

35. Another type of issue conflict can arise where an arbitrator is said to have "pre-judged" issues based on their prior awards or decisions, publications and statements indicating their views on particular legal issues or on ISDS as a regime. A study by the International Council for Commercial Arbitration (ICCA) and others, involving consultation with arbitrators, counsel, members of arbitral institutions, and academics, among others, highlighted a distinction between views about legal and factual issues.[25] The Report found that prior decisions on legal matters alone were unlikely to lead to disqualification (consistent with the approach under the IBA Guidelines). On the other hand, views about factual matters — particular those arising in the instant dispute — have been found to be of concern. However, the degree of engagement considered to raise concern in relation to facts at issue arising outside the instant dispute has varied in ICSID challenge decisions.[26]

36. Tribunals have also held that prior interpretation of a legal clause at issue in a pending case alone need not indicate a lack of impartiality, as it is not related to the merits of the case, and that presentation of a particular argument as counsel was not sufficient to prevent an arbitrator considering the question impartially. Similar

[24] The PluriCourts Investment Treaty Arbitration Database (PITAD) as of 1 January 2017 and ICSID annulment proceedings respectively. See Malcolm Langford, Daniel Behn, Runar Hilleren Lie, The Revolving Door in International Investment Arbitration, Journal of International Economic Law, Volume 20, Issue 2, 1 June 2017, Pages 301–332, https://doi.org/10.1093/jnel/jgx018. The study found that of the 2,699 lawyers that represent claimants and respondents, only 1 per cent (the top 25) have participated in more than 13 cases.

[25] See Report of the Joint Task Force on Issue Conflicts in Investor-State Arbitration established in November 2013 between ICCA and the American Society of International Law's Howard M. Holtzmann Center, available at http://www.arbitration-icca.org/publications/ASIL-ICCA_Report.html.

[26] Caratube v. Kazakhstan (ICSID Case No. ARB13/13), cf Içkale v. Turkmenistan (ICSID Case No. ARB/10/24).

findings were made regarding published academic opinions, which were not considered as evidence of pre-judgment.[27]

37. The IBA Guidelines include prior legal opinions in the Green List,[28] as examples of "specific situations where no appearance and no actual conflict of interest exists from an objective point of view" and which the "arbitrator has no duty to disclose."

38. An ICSID tribunal has stated that unless the opinions expressed are "specific and clear enough that a reasonable and informed third party would find that the arbitrator will rely on such opinions without giving proper consideration to the facts, circumstances, and arguments presented by the [p]arties in [the] proceeding," there is no lack of independence and impartiality.[29]

39. The following prior opinions or decisions have been held insufficient in ICSID to indicate a relevant bias: a prior decision or procedural ruling against a party; a prior dismissal of a party's application for reconsideration; expressed views on legal issues not raised in the pending case; a difference of opinion between the tribunal members on an interpretation of fact or law; that an arbitrator's prior decision is subject to an annulment application.[30]

(iv) Other issues or concerns

40. At the 35th session, the Working Group heard that parties or their counsel might appoint arbitrators in ISDS that would support their positions in the case (A/CN.9/935, para. 56), and that the issues of party remuneration, dissenting opinions and repeat appointments of certain arbitrators could indicate arbitrator bias. It has also been said that informal controls, such as pressure from within the population of arbitrators and an arbitrator's interest in maintaining his or her reputation as a fair-minded decision maker, may mitigate those issues. In addition, it was also that the appointment of a presiding arbitrator could ensure a certain level of neutrality, independence and impartiality in the tribunal, but that polarization in tribunals so that the ultimate responsibility for deciding the case rested with the presiding arbitrator could compromise the notion of a three-member tribunal, seeking a unanimous decision (A/CN.9/935, paras. 54 and 60).

41. The party remuneration of arbitrators was considered to be a cause of perceptions that co-arbitrators might support their appointing party,[31] or might provide an economic incentive for them to interpret jurisdiction broadly, which would

[27] See, for example, ICSID cases Tidewater Inc. and others v. Bolivarian Republic of Venezuela, ARB/10/5, Decision on Claimant's Proposal to Disqualify Professor Brigitte Stern, Arbitrator, December 23, 2010, Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela, ARB/10/9, Decision on Claimant's Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Tawil, Arbitrators, May 20, 2011, Saint Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/13, Decision, 54–56 (Feb. 27, 2013), Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentina, Participaciones Inversiones Portuarias (PIP) SARL v. Gabon ICSID Case No. ARB/08/17, Decision, (Nov. 12, 2009).

[28] For a summary of the various Application Lists under the IBA Guidelines, see footnote 13 supra.

[29] Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26.

[30] In addition to the cases in footnotes 26 and 29 above, see Perenco Ecuador Limited v. Republic of Ecuador, ICSID Case No. ARB/08/6, Decision on Challenge to Arbitrator (Dec. 8, 2009), Abaclat and others v. Argentine Republic, ICSID Case No. ARB/07/5, Decision (Dec. 21, 2011) Repsol, S.A. & Repsol Butano S.A. v. Republica Argentina, ICSID Case No. ARB/12/38, Decision Sobre la Propuesta de Recusacion a la Mayoria del Tribunal, ConocoPhillips Company and others v. Bolivarian Republic of Venezuela, ARB/07/30, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator, February 27, 2012.

[31] Under the default rules of the main arbitral institutions, fees for the co-arbitrator are typically payable by the disputing parties, and those of the presiding arbitrator are shared equally between them.

increase the market for future cases.[32] On the other hand, it has been said that the relative impact of this economic incentive may be sufficiently low that the issue is not significant. Studies have not identified a causal link between these matters and studies of national courts and international courts indicate that judges may err on the generous side in issues of jurisdiction.

42. The Working Group also heard at its 35th session that dissenting opinions were overwhelmingly issued by the arbitrators appointed by the losing party, which contributed to the overall perception of possible bias (A/CN.9/935, para. 58). Possible explanations from commentators include that arbitrators feel themselves under a duty to their appointing parties or counsel or, conversely, that the arbitrators are not randomly-selected and therefore the level of dissents is not itself indicative of bias. In addition, there does not appear to be consensus on what the "correct" level of dissenting opinion might be, and whether the existence or level of dissenting opinions can indicate bias. It has also been said that ISCID statistics indicate that issuing a dissenting opinion reduces the chances of reappointment as a presiding arbitrator. In addition, the majority of ISDS cases are decided unanimously, indicating that in that majority of cases, either the investor-appointed arbitrator is agreeing to reject the investor's claims or the State-appointed arbitrator is agreeing to find against the State.

(b) Addressing a potential lack of independence and impartiality: the duty for arbitrators to disclose

43. The primary regulatory mechanism designed to ensure independence and impartiality of arbitrators is the requirement that they disclose all interests or other relationships that may be "problematic", i.e. raise potential conflicts of interest. Under both the ICSID Rules and the UNCITRAL Rules, arbitrators are required to disclose any circumstance that might cause doubts regarding the independence and impartiality of the arbitrator.[33] This includes signing a declaration disclosing any past or present relationships with the parties and any other circumstances that might cause a party to question the arbitrator's reliability for independent judgment at the time of appointment.[34] The disclosure obligation is then continuing, including the prompt disclosure of any relevant circumstances that arise after appointment.

44. The legal framework also includes soft law instruments, such as the IBA Guidelines. These Guidelines provide more detailed disclosure requirements, in that they set out quantitative, objective, and fact-based categories of information. These example-based guidelines can help delineate whether relationships are problematic in individual cases. However, they do not address all areas relevant for ISDS, notably relationships between the arbitrators on the one hand and counsel and the parties on the other.

45. Arbitral institutions have also recently sought to complement the existing legal framework by providing soft law guidance. One example is the ICC "Guidance Note for the disclosure of conflicts by arbitrators" in 2016, designed to ensure "that arbitrators are forthcoming and transparent in their disclosure of potential conflicts".[35] The ICC explains that this Note relies on the "fundamental principle that parties to an

[32] See Gaukrodger, D. (2017), "Adjudicator Compensation Systems and Investor-State Dispute Settlement", OECD Working Papers on International Investment, No. 2017/05, OECD Publishing, Paris, https://doi.org/10.1787/e2890bd5-en.

[33] See Rule 6(2), ICSID Rules; Article 13(2), ISCID Additional Facility Rules; Article 11, UNCITRAL Rules. It may be noted that the current process of revision of the ICSID Rules address the matter, under the proposed revision, the disclosure requirements have been increased in the declarations and with respect to third-party funding. This will help to avoid conflicts of interest in the selection process and will give parties better information as to whether an application for disqualification is warranted. (See "Proposals for amendment of ICSID rules — Synopsis, at para. 34, available at https://icsid.worldbank.org/en/Documents/Amendments/Vol.One.pdf.)

[34] See Rule 6(2), ICSID Rules; see Annex, UNCITRAL Arbitration Rules.

[35] See https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration/. For further explanation from the ICC, see https://iccwbo.org/media-wall/news-speeches/icc-court-adopts-guidance-note-on-conflict-disclosures-by-arbitrators/.

arbitration have a legitimate interest in being fully informed of all facts or circumstances that may be relevant in their view in order to be satisfied that a prospective arbitrator or arbitrator is and remains independent and impartial or, if they so wish, to explore the matter further and/or take the possible courses of action contemplated by the ICC Rules".[36]

46. In the context of international courts and tribunals, the International Court of Justice provides that if a member of the Court considers that "for some special reasons" he should not take part in the decision of a particular case, he should inform the President accordingly.[37] The Burgh House Principles require judges to "disclose to the court and, as appropriate, to the parties to the proceedings any circumstances which come to their notice at any time by virtue of which any of Principles 7 to 13 apply". The Principles also require courts to establish "appropriate procedures to enable judges to disclose to the court and, as appropriate, to the parties to the proceedings matters that may affect or may reasonably appear to affect their independence or impartiality in relation to any particular case". They also allow a waiver mechanism similar to that in the IBA Guidelines: "judges shall not be prevented from sitting in a case where they have made appropriate disclosure of any facts bringing any of those Principles into operation, and where the court expresses no objections and the parties give their express and informed consent to the judge acting" (Principle 15).[38]

47. Under the WTO DSU, members of the appeals board (among other relevant persons) are to be "independent and impartial, shall avoid direct or indirect conflicts of interest and shall respect the confidentiality of proceedings of bodies pursuant to the dispute settlement mechanism, so that through the observance of such standards of conduct the integrity and impartiality of that mechanism are preserved."[39] The application is different from the situation in ISDS: the WTO Working Procedures for Appellate Review, which apply to the WTO appeals procedure, limit the disclosure requirement for the judges concerned by providing that issues of insignificant relevance need not be disclosed, and the privacy of judges is also to be respected.[40]

48. At the international level, the extent of a duty upon arbitrators to investigate potential conflicts of interest is unclear. Some tribunals have found that arbitrators can be deemed impartial if they do not have knowledge about a certain conflict and that arbitrators do not have a duty to investigate, but others have required arbitrators to investigate potential conflicts of interest. The IBA Guidelines provide that "(f)ailure to disclose a conflict is not excused by lack of knowledge, if the arbitrator does not perform such reasonable enquiries."[41] However, what may be considered to comprise "reasonable enquiries" is considered to depend on circumstances.

(c) Contours of the challenge mechanism

49. A further critical safeguard to ensure independence and impartiality on the part of arbitrators comprises standards and procedures for parties to challenge arbitrators based on a real or apparent lack of independence or impartiality. An effective challenge mechanism must fulfil two functions. Its first function is to provide the teeth of the requirements for independence and impartiality and so to the public interest in fair procedures: that is, it must allow for partisan arbitrators to be disqualified. Secondly, it must be sufficiently robust to allow for cases to proceed.

50. The usual consequence of a finding of non-compliance with ethical standards after the appointment of an arbitrator is the removal and replacement of the arbitrator

[36] Ibid.
[37] ICJ Statute, Article 24 (1).
[38] For information on the Burgh House Principles, see footnote 3 above.
[39] "Rules of conduct for the understanding on rules and procedures governing the settlement of disputes", 1996, available at https://www.wto.org/English/tratop_e/dispu_e/rc_e.htm.
[40] Rule VI. This rule weighs the importance of disclosure is against competing factors, but under the rules any doubt is to be resolved in favour of disclosure.
[41] General Standard 7(d).

(ii) What are the standard of proof and threshold for disqualification?

56. Under article 57 of the ICSID Convention, a challenging party must demonstrate a "manifest lack" of (among other things) "[r]eliability to exercise independent judgment".[45] As noted above, the UNCITRAL Model Law refers to the existence of circumstances "that give rise to justifiable doubts as to [an arbitrator's] impartiality or independence" (Article 12(2)).

57. It is generally agreed that proof of actual dependence or bias is not required. Rather, "it is sufficient to establish the appearance of dependence or bias."[47] The appearance should be obvious or evident (that is, not speculative or based on inference or mere belief); it has been said it should be apparent to the court without the assistance of counsel; it must be grounded in facts, and that the standard "imposes a relatively heavy burden of proof" on the challenging party. Moreover, according one decision on challenge by the Appointing Authority in the Iran-United States Claims Tribunal, "the challenged person should be given the benefit of the doubt as to the truth of what is alleged in support of the challenge".[48]

58. The precise meaning of "manifest lack" has varied across cases. While neither article 14 or 57 of ICSID Convention refers to a test of "reasonable doubts" or a third-party objective observer, some ICSID decisions indicate that "reasonable doubts" — the UNCITRAL standard — are sufficient.[49] Consequently, it has been said that if "a third party would find that there is an evident or obvious appearance of lack of impartiality or independence based on a reasonable evaluation of the facts in the present case," an inference of manifest bias can be made. Other decisions indicate that "manifest" involves a higher standard, so that the conflict is evident or apparent.[50]

59. As a general matter, data indicate that proportionately very few challenges are successful, whether measured against overall caseload or challenge applications,[51] though as arbitrators may resign when challenged, these figures may not provide a true picture of the efficacy of the mechanism. The Working Group may also wish to note that the limited published decisions emphasize their fact-specific nature, so that they provide examples of situations in which impartiality and independence are lacking, rather than providing comprehensive guidance on the application of the standards in practice.

60. A common ground for launching a challenge arises if the arbitrator and appointing party or counsel had a prior or have a continuing personal or professional

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[45] For a listing of ICSID disqualification decisions, see https://icsid.worldbank.org/en/Pages/Process/Decisions-on-Disqualification.aspx.

[47] Caratube International Oil Company LLP & Mr. Devincci Salah Hourani v. Republic of Kazakhstan, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr Bruno Boesch, (Mar. 20, 2014), available at http://italaw.com/sites/default/files/case-documents/italaw3133.pdf, at para. 57. This reasoning was also followed by the ICSID Chairman in two earlier decisions: Blue Bank v. Venezuela (Blue Bank Int'l & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, paras. 22–26 (Nov. 12, 2013)) and Burlington v. Ecuador (Burlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña (Dec. 13, 2013), available at http://italaw.com/sites/default/files/case-documents/italaw3028.pdf).

[48] Challenge request of Mr. Assadollah Noori, member of the Chamber one, in case No. 248, 24- Iran-United States Claims Tribunal at 309-324 (March 2, 1990).

[49] Compania de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic, ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee, (Oct. 3, 2001); SGS Societe Generale de Surveillance S.A. v. Pakistan, ICSID Case No. ARB/01/13.

[50] That is, the conflict is "self-evident, clear, plain on its face or even certain, rather than the product of elaborate interpretations one way or another or susceptible of argument one way or another or being necessary to engage in elaborate analyses". Electrabel S.A. v. Republic of Hungary (Electrabel), ICSID Case No. ARB/07/19, Decision on the Claimant's Proposal to Disqualify a Member of the Tribunal (Feb. 25, 2008).

[51] Approximately 3 per cent of challenge applications in ICSID, and 22 per cent in commercial arbitrations at the London Court of Arbitration (both percentages based on published decisions). See, also, the PCA submission in A/CN.9/WG.III/WP.146, para. 60.

relationship outside the instant appointment which may compromise the arbitrator's ability to decide the case on an independent and impartial basis. Such so-called "problematic" relationships are assessed by reference to such matters as the proximity, duration and financial impact of the relationship, and whether it is historical or ongoing.

61. ICSID cases have found the following relationships did compromise independence and impartiality: where an overseas branch of the arbitrator's law firm was acting against the respondent in another arbitration and the challenged arbitrator derived remuneration from the different branches of the firm; where the arbitrator was also appointed as arbitrator in a related case raising overlapping issues of law and fact, and the arbitrator could not be expected to maintain objectivity and open-mindedness;[52] where the counsel and arbitrator are from the same chambers, following a change in the composition of the respondent's team to include the barrister as counsel, after the proceedings had begun.[53]

(iii) *Challenge decisions in international arbitration, national systems and international courts and tribunals*

62. In the broader international arbitration context, other relationships that have been found to raise "justifiable doubts" about independence and impartiality include: multiple appointments where the arbitrator does not maintain diversified sources of appointments; and prior relationships between parties and the arbitrator's law firm (one providing unrelated legal advice in the past, the other advice on the contract that was the subject of the arbitration). A material question is the extent to which the arbitrator is financially dependent on the entity or person with which he or she has a relationship. If the arbitrator has a significant financial interest in the outcome of the case, or if multiple appointments indicate financial dependence on a party or counsel, he or she is vulnerable to disqualification.

63. At the national level, some courts have held that a board member may not act as an arbitrator in cases involving the company concerned, but the English Court of Appeal has stated that there is no risk of bias in such a situation.[54]

64. The "Application Lists" in the IBA Guidelines do not include any relationships outside the instant arbitration as Waivable or non-Waivable Red List cases.[55] Such relationships fall within "specific situations that, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence" (that is, within the Orange list).[56] These include prior legal advice given to, or previously acting as counsel for, one of the parties; more than two previous appointments within three years; more than three appointments ongoing but unrelated legal advice from the arbitrator's law firm; membership of the same barrister's chambers as another co-arbitrator or counsel; acting as co-counsel, and other issues indicating financial dependence.

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[52] Caratube International Oil Company LLP & Mr. Devincci Salah Hourani v. Republic of Kazakhstan, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr Bruno Boesch, (Mar. 20, 2014)

[53] Hrvatska Elektroprivreda, d.d. v. Slovenia, ICSID Case No. ARB/05/24, Order Concerning the Participation of a Counsel, para. 34 (May 6, 2008). By contrast, ICSID cases have found the following relationships did not result in a lack of independence or impartiality: A non-executive directorship of a company that was a minority shareholder of the parties; Where a member of an arbitrator's law firm had advised the claimant on a transaction unrelated to the arbitration (but had not given strategic or general legal advice); Where the arbitrator had given tax advice to the principal shareholder in the claimant corporation and had a profit-sharing arrangement with the lawyers acting for the claimant before his appointment, but no longer held these positions; Where an arbitrator was formerly co-counsel with the appointing counsel; A transitory and long-ago schooling acquaintance between an arbitrator and counsel to a party; and Occasional social contacts between the claimant and its party-nominated arbitrator.

[54] W Limited v. M Sdn Bhd [2016] EWHC 422 (Comm)

[55] For a summary of the various Application Lists under the IBA Guidelines, see footnote 13 supra

[56] Ibid

65. Despite their increasing acceptance, the Working Group may also wish to note that the IBA Guidelines are not always accepted as setting the relevant standard.[57] For example, in a United Kingdom of Great Britain and Northern Ireland case, a sole arbitrator in an international commercial arbitration case was a partner in a law firm that, during the course of the arbitration in question, provided substantial legal services to, and derived substantial remuneration from, an affiliated company of the defendant. The judge ruled that there was no apparent bias, although he accepted that the conflict clearly fell within paragraph 1.4 of the non-Waivable Red List.[58] In holding that a "fair minded and informed observer" (the relevant standard in English law) would not conclude that there was a real possibility that the arbitrator was biased, the judge stated that paragraph 1.4 inappropriately failed to take account of "whether the particular facts could realistically have any effect on impartiality or independence", and in particular in the instant case where the relationship was not known to the arbitrator."[59]

66. The International Residual Mechanism for Criminal Tribunals has a case database, which includes disqualification applications.[60] The cases set a high bar for disqualification; decisions include that "there is a presumption of impartiality that attaches to a Judge or a Tribunal and, consequently, partiality must be established on the basis of adequate and reliable evidence;" in the absence of evidence to the contrary, it must be assumed that the judges of the International Tribunal "can disabuse their minds of any irrelevant personal beliefs or predispositions."[61]

67. Published information indicates that the Iran-United States Claims Tribunal has witnessed five challenge procedures since it started its work in 1981. The Appointing Authority in charge of making the decision on the challenge under Tribunal Rules has never sustained a challenge. However, in two of those challenges, the arbitrators withdrew from the case or were removed by the party itself. [62]

3 Desirability of reform

Reform objectives

68. At the 35th session of the Working Group, it was mentioned that:

- Improvements to enhance the independence and impartiality of the arbitrators should be welcomed as it would be in the interests of both States and investors;
- Improvements to the framework aimed at ensuring the independence and impartiality of arbitrators were constantly being introduced; therefore, when considering possible solutions at a later stage, the benefits and limitations of the existing framework and of the work carried out by other institutions should be taken into account; and

[57] For example, and as discussed in the Background Information on the IBA Guidelines, the English common law position as set out in Porter v Magill [2001] UKHL 67 is "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased; in Sweden, whether circumstances that may "diminish confidence in the arbitrator's impartiality" exist; and "evident partiality" in the United States.

[58] Paragraph 1.4 governs situations in which "the arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom".

[59] A Ltd. V. M SDN BHD ([2016] EWHC 422 (Comm)). The Cour de Cassation in France, however, took a different view, holing that the sole arbitrator's failure to disclose his firm's role in a transaction involving the parent company of one of the parties to the arbitration was "such as to reasonably cause a doubt regarding the independence and impartiality of the arbitrator" (Court de Cassation, Civ. 1, 16 December 2015, N D14-26.279).

[60] Available at http://cld.irmct.org/?q=en/cases/ictr-icty-case-law-database.

[61] See cases at http://cld.irmct.org/notions/show/1027/judges#, and a summary of the position in judgment in the case of Rutaganda v. Prosecutor, available at http://unictr.irmct.org/en/cases/ictr-96-3.

[62] See Challenge request from the United States Agent to Appointing Authority Moons, 7 Iran-United States Claims Tribunal at 289-301 (Sept. 17, 1984), and Letter Iranian Agent to Moons, 20 Iran-United States Claims Tribunal at 181 (Sept. 13, 1988).

- The interests of all stakeholders in ISDS should be considered, and any solutions should ensure a balance of interests of stakeholders (A/CN.9/935, para. 62).

69. The Working Group may also wish to consider the desirability of taking into account potential cross-benefits between reforms to enhance the independence and impartiality of arbitrators on other elements of the ISDS regime, including on consistency and coherence in ISDS awards and on costs and duration of ISDS proceedings.

Preliminary views expressed by States

70. At its 35th session, the Working Group heard some preliminary views regarding possible ways to better guarantee the independence and impartiality of arbitrators.

71. Regarding specific approaches, there was broad agreement on the importance of codes of conduct and other ethical requirements for arbitrators. Taking note of a number of existing texts on the conduct of arbitrators (including soft law instruments), the need for efforts at a multilateral level was mentioned. In that context, suggestions were made to the effect that UNCITRAL and ICSID might cooperate in developing such a code. Another suggestion was made that a code of conduct for counsel and experts would be useful (A/CN.9/935, para. 64).

72. Further suggestions included: (i) ensuring that all stakeholders understood the thresholds for when independence and impartiality would be seen to be impaired; (ii) developing requirements for qualifications of arbitrators, their roles and requirements regarding diversity or appropriate regional representation; and (iii) considering different means of appointing arbitrators, including the increased use of appointing authorities or the use of rosters established by States (A/CN.9/935, para. 65).

Questions for consideration

73. In considering the extent to which the existing ISDS regime provides sufficient guarantees of independence and impartiality on the part of arbitrators and decision makers, and any possible reforms it may deem necessary, the Working Group may wish to take into account the characteristics of, and reforms currently underway in, other systems various as discussed above.

74. The Working Group may also wish to note that the additional questions for consideration set out below are also discussed in document A/CN.9/WG.III/WP.149, which provides a general framework for considering the desirability of reforms.

– *Notions of independence and impartiality*

75. The Working Group may wish to note that the notions of independence, and impartiality are elusive, since the terms are employed with several different meanings in legal analyses. At least four senses of independence and impartiality can be identified: they can be referred to at various times as states of mind, institutional conditions, values related to the rule of law or duties (which operate, as the context requires, as either rules or principles). Distinguishing between these meanings may be key in any further work on ethics.[10]

76. The Working Group may wish to consider the impact of the importance of individual (as opposed to institutional) independence in ISDS. The usual safeguards of institutional independence (autonomous budget, internal organization, transparent recruitment processes, objective case assignment, a secure and tenure and fixed terms) do not exist in ISDS. The Working Group may wish to consider whether that characteristic may in part explain the tensions between the appointment mechanisms and the notions of independence and impartiality as they derive from the context of courts and judges.

[10] Issues in contemporary jurisprudence 28 2016, Rule of Law, Independence, *Impartiality and Neutrality in Legal Adjudication*, Diego M. Papayannis

77. In addition, there are relatively few specialists in the field of ISDS compared to the number of specialists in commercial arbitration in general. In a 2017 study, based on 1,039 cases in the databases of Pluricourts and ICSID, the findings are that a small group of 25–30 individuals (one per cent of the lawyers) dominate the system. [54] A person may therefore be called to decide a dispute whose ruling turns out to be relevant in other cases in which this professional acts as a counsel or in close professional relationship with counsel. These particularities of ISDS mean that, in practice, the circumstances of the case must be weighed in order to determine whether an arbitrator who has pre-existing professional relationships with one of the parties is in violation of the duty of independence or impartiality.

78. The Working Group may also wish to consider the impact of the expansion of international arbitration, which has resulted in the diversification of parties involved in the arbitration process. As such, the perspectives of the parties on ethics or conduct of arbitrators may differ significantly and what one expects may sometimes be at odds with the expectations of others from another jurisdiction or with the general practice in international arbitration. The increased complexity of recent disputes involving multiple parties and complicated transactions lead to new and more subtle questions on ethical requirements. Increased regulation of the arbitral procedure and increased transparency of the process also have an impact on parties' expectations in relation to ethics and conduct of arbitrators.

79. In addition, while there seems to be a general agreement about the fundamental ethical standards, in practice however, the assessment of compliance with such standards may be carried out quite differently depending on the texts deemed applicable, and depending also on whether assessment is made by the arbitrators themselves, the parties, the arbitral institutions or national courts. In addition, ethical standards, which by nature evolve with practical reality usually lack explanatory contents about their practical implications. Furthermore, arbitral tribunals can be bound by more than one ethical standard depending on the nationality of the arbitrators, affiliation with bar associations, as well as the place of arbitration. Therefore, multiple norms may apply at the same time, without any clear indication on which shall prevail in case of conflict.

- *Disclosure and challenge*

80. The Working Group may wish to consider whether the procedures for disclosure and challenge are sufficiently certain and predictable to allow arbitrators deciding in practice what should be disclosed and parties in deciding whether to challenge the appointment of an arbitrator or seek annulment of an award or resist enforcement based on an arbitrator's failure to disclose.

81. The Working Group may also wish to take into account that disclosure requirements may require the disclosure of information that would not necessarily constitute a basis for disqualification. The disclosure requirements under the UNCITRAL Rules apply to circumstances that are "likely to give rise to justifiable doubts" about the arbitrator's independence and impartiality, whereas disqualification relies on "circumstances … that give rise to justifiable doubts as to the arbitrator's impartiality or independence". [55] Similarly, the "reliability for independent judgment" under the ICSID Rules on disclosure has been said to be broader than the "manifest lack" of that quality that would lead to disqualification. [56]

82. In addition, the Working Group may wish to consider that while applicable standards require independence and impartiality on the part of arbitrators and other decision makers, they do not provide detailed guidance on the application and interpretation of independence and impartiality in practice. As the discussion of

[54] Network of arbitrators and lawyers in investment treaty arbitration. Langford, Behn, and Lie (2017), see https://www.jus.uio.no/pluricourts/english/news-and-events/news/research-news-double-hatting.html

[55] Articles 11 and 12, UNCITRAL Rules

[56] Rule 6(b), ICSID Rules

published challenge decisions above indicates, the application of the standards in practice may be difficult to predict. Consequently, the Working Group may wish to consider whether those decisions by themselves can provide sufficient guidance on both disclosure and disqualification standards.

83. As noted above, the efficacy of the challenge mechanism relies on parties or their counsel being willing to apply to disqualify an arbitrator and on an effective procedure when they do so. Key elements are that the applications have a predictable outcome, and that they are decided promptly, and without consequences for the challenging party (whatever the outcome may be). Ad hoc examples provide indications that there is a fear of negative consequences for the party applying to disqualify, meaning that some situations in which there may be a lack of independence and impartiality are not addressed. In addition, there is a perception that conflicts of interest are not sufficiently addressed through the mechanism.

84. There is ad hoc commentary to the effect that the number of challenges and the number of tactical, vexatious or frivolous challenges may be increasing in international arbitration generally.[47] In one ISDS case, there were five separate challenges to one arbitrator, stretching from October 2011 to February 2016, all of which were dismissed.[48]

85. The Working Group may also wish to consider the extent to which procedural elements from outside the UNCITRAL and ICSID contexts may provide additional support to the efficacy of the mechanism. In some institutional arbitrations, for example, the arbitral institution hears the challenge, and procedures include rounds of written applications and commentary from opposing parties and the arbitrators.

86. In light of the lack of routine publication of challenge decisions in ISDS, the Working Group may also wish to consider whether there should be increased transparency in those challenges. By way of comparison, the LCIA publishes online decisions on challenges to arbitrators in international commercial arbitration, together with a digest of decisions.[49]

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[47] See, for example, LCIA Reference No. 100011 (3 August 2005).

[48] ConocoPhillips Company and others v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30.

[49] Available at http://www.lcia.org/challenge-decision-database.aspx. The cases include those under the LCIA Rules, and arbitrations under the UNCITRAL Rules where the LCIA was the appointing party.

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Possible reform of investor-State dispute settlement (ISDS)

Arbitrators and decision makers: appointment mechanisms and related issues

Note by the Secretariat

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I. Introduction

1. For the information of the Working Group, document A/CN.9/WG.III/WP.151 addresses the question of independence and impartiality of arbitrators and this Note addresses the related questions of the impact of arbitrator appointment mechanisms and desirability of reforms. This Note addresses the topic of desirability of reforms regarding arbitrators and decision makers in investor-State dispute settlement (ISDS) on the basis of the issues set out in both documents.

2. At its 35th session, the Working Group suggested that information on other legal frameworks on appointment mechanisms should be made available to the Working Group, in particular addressing international commercial arbitration and international courts and tribunals (A/CN.9/935, para. 46). This note includes information regarding these "comparators" and provides commentary on the relevance and reliability of information and data on individual issues, where appropriate.

3. As is the case for other documents provided to the Working Group, this Note was prepared with reference to a broad range of published information on the topic.[1]

4. While this Note provides information to assist the Working Group in its consideration of certain concerns in ISDS and the desirability of reforms, it does not seek to express a view on the issues raised, which is a matter for the Working Group to consider.

II. Appointment mechanisms and related issues

1. Assessment of identified concerns

5. In the current ISDS regime, appointment of arbitrators and decisions makers is most commonly made by the disputing parties and to a much lesser extent by appointing authorities, including arbitral institutions, tasked with assisting in the process. The fragmented nature of the ISDS regime therefore does not provide for a uniform process. How the tribunal will be composed, and the individual arbitrators selected, are governed by the applicable governing treaty provisions or specific contractual provisions and, if none, under the default rules of any relevant arbitral institution (such as those of ICSID) or the applicable ad hoc rules (such as those of UNCITRAL).

(a) Appointment of arbitrators in ISDS

Party appointment

6. The ICSID and UNCITRAL Rules have similar approaches to the process of appointment of arbitrators. They provide for a default three-party tribunal, with the parties each appointing one arbitrator (these two arbitrators are commonly referred to as the "co-arbitrators"). The co-arbitrators (UNCITRAL) or the parties (ICSID) themselves then appoint the presiding arbitrator by agreement.[2] Very few investment treaties address the appointment mechanisms, though some recent bilateral treaties

[1] See bibliographic references published by the Academic Forum, available under "Additional resources" at http://www.uncitral.org/uncitral/en/publications/online_resources_ISDS.html. The preparation of this Note also benefitted from contributions by the following experts: Susan Franck, Jean Kalicki, Joost Pauwelyn, Sergio Puig and Maxi Scherer.

[2] At ICSID, the arbitral tribunal "shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties" (see article 37(2)(b)). Under the UNCITRAL Rules, "[i]f three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal (see article 9(1)). As a practical matter, even where appointment of the presiding arbitrator is formally done by the parties rather than the co-arbitrators, it is customary for the parties to agree that the co-arbitrators may be consulted, to ensure that the candidates under consideration for presiding arbitrator will be ones with whom the co-arbitrators have no objection to serving.

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have included developments as compared with what can be termed more "traditional" approaches.[3]

7. Arbitral rules do not set out a process that a party must follow in identifying and appointing an arbitrator. The parties are free to select any person to serve as an arbitrator provided that s/he meets the applicable criteria. The party engaged in the selection of a potential arbitrator will investigate qualifications and background. Such investigations, which sometimes include a limited interview, cover whether and where s/he has acted as arbitrator or counsel in ISDS cases, has advised the parties or related parties, issued publications and statements, and seek to gain insight into personality, reputation, technical skills, language abilities and approach to the arbitral process in general.

8. Guidelines designed to protect the integrity of the process and independence and impartiality of the potential arbitrator where interviews are conducted provide, among other things, that the interview should not seek to identify the potential arbitrator's views on the substance of the case. [4]

9. In the context of ISDS, where a State is involved, and the issues at stake usually invoke issues of public interest, concerns have been raised regarding the appointment of arbitrators by the parties (A/CN.9/935, para. 54).

Appointment by appointing authorities

10. The Working Group may wish to note that the Rules of ICSID[5] and UNCITRAL[6] foresee the intervention of an appointing authority to assist the parties in the appointment process.

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[3] In the Comprehensive Economic and Trade Agreement (CETA), appointments are made by a Joint Committee (which, pursuant to article 26.1, comprises "representatives of the European Union and representatives of Canada"). The Joint Committee appoints fifteen tribunal members, of whom five shall be nationals of a Member State of the European Union, five shall be nationals of Canada, and five shall be nationals of third countries (article 8.27.2). The Joint Committee also appoints members of the appellate tribunal, in a number to be later established by the Joint Committee (see Art. 8.28.3). The process is similar in the European Union-Viet Nam Free Trade Agreement, Chapter 8 II, Section 3, Art. 12(3) and Art. 13(2).

[4] For example, Guideline 8(a) of the IBA Guidelines on Party Representation in International Arbitration states that, "[a] Party representative may communicate with a prospective Party-Nominated Arbitrator to determine his or her expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest", but should not discuss the case (Guideline 8(d)).

[5] Where ICSID acts as appointing authority (if parties are unable to appoint all members of the Tribunal within 90 days of the registration of the request for arbitration), either party may request that the Chairman of the ICSID Administrative Council appoint the arbitrator(s) not yet appointed (see description of the process in document A/CN.9/WG.III/WP.146, paras. 52–55). The first stage is a ballot procedure. Where the ballot process results in a selection, it is considered to be a party-agreed appointment. Where the process does not result in agreement, ICSID names an arbitrator from the Panel (and the parties may raise any circumstance showing that the person lacks the qualities required under the ICSID Convention). ICSID seeks to complete this process within 30 days (https://icsid.worldbank.org/en/Pages/process/Selection-and-Appointment-of-Tribunal-Members-Convention-Arbitration.aspx). It may be noted that the current process of revision of ICSID Rules addresses the matter; under the proposed revision, parties would be allowed to request assistance at any stage and they would have the ability to ask for different types of assistance including a (non-binding) ballot, a (binding) list process or otherwise (see "Proposals for amendment of ICSID rules — Synopsis, at para. 31, available at https://icsid.worldbank.org/en/Documents/Amendments_Vol_One.pdf).

[6] Under the UNCITRAL Arbitration Rules, the default three-member tribunal allows the appointing authority to appoint a co-arbitrator or a presiding arbitrator if the party has not appointed its co-arbitrator or if the co-arbitrators have not agreed on a presiding arbitrator within 30 days (see arts. 8 and 9). The appointing authority uses a list procedure. The UNCITRAL Rules provide that the appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator, and is to take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties (see also the ICSID submission in document A/CN.9/WG.III/WP.146, paras. 42–56).

11. The method of appointment itself and the shortlisting of appointed arbitrators on individual cases are governed by legal requirements and established practice to allow for a timely appointment of competent arbitrators when the parties or the co-arbitrators fail to do so. In practice, a list procedure (or ballot procedure) is a well-established practice. A shortlist is composed of qualified arbitrators selected by the appointing authority (depending on the circumstances of the case and taking into account the legal requirement such as nationality or impartiality), on an informal basis and sometimes after consultation with the parties.

12. Regarding appointment by an appointing authority, the main concern raised relates to the lack of transparency in the appointment process, as emphasized in the recent work of the Organization for Economic Cooperation and Development (OECD) on the matter.[7] Transparency in the appointment of arbitrators by appointing authorities may be considered at two stages: first, regarding the preparation and disclosure of lists (or pools) of proposed arbitrators and the process of selection for a particular case; and second, the disclosure of appointment activity by appointing authorities in ISDS.

13. The Working Group may wish to recall that the appointment process in ISDS, relying mainly on party-appointment and only at the margin on appointing authorities (see figures at paras. 11 and 44 of A/CN.9/WG.III/WP.146), has relatively recently been the subject of detailed scrutiny. Moreover, as noted above, arbitrators must fulfil certain requirements (nationality, experience) and failing to do so could trigger a challenge to that arbitrator by the opposing party, which is a situation that appointing authorities seek to avoid (see, in particular, the Permanent Court of Arbitration (PCA) submission in A/CN.9/WG.III/WP.146, para. 58).

14. As for the disclosure of appointment activity by appointing authorities, very little information is publicly available. It may be noted that arbitral institutions have recently taken measures in order to address the criticism of lack of transparency. In particular, some of the main institutions have allowed for more systematic disclosure about the appointment and the composition of arbitration tribunals.[8]

(b) Comparison with other adjudicatory systems

15. The Working Group may wish to note that the appointment mechanisms in ISDS are comparable to appointment mechanisms in commercial arbitration and State-to-State arbitration. They are, however, very different from the mechanisms regarding the appointment of adjudicators in international bodies, where a distinction should be made between selection of adjudicators to become a member of an adjudicative body and assignment of a specific case among adjudicators or to chambers,[9] and from common methods for judicial appointments at the national level.

16. As regards the appointment of international judges, States nominate candidates for international judicial office in an election or appointment process that is similar across many international courts and tribunals, albeit with some variations. The process is typically transparent in that it is set out in the relevant statutes or rules. In

[7] *Appointing Authorities and the Selection of Arbitrators in Investor-State Dispute Settlement: An Overview*, Consultation Paper, March 2018, David Gaukrodger, Investment Division, Directorate for Financial and Enterprise Affairs, Organization for Economic Cooperation and Development, Paris, France.

[8] ICSID provides for disclosure of the composition of each arbitral tribunal. Other institutions that were in the scope of the OECD study (the Permanent Court of Arbitration (PCA), and the Arbitration Institute of the Stockholm Chamber of Commerce (SCC)) do not publish information related to the arbitrators' identity or qualification except with party consent. As a practical matter, however, many appointments do become public knowledge, either through mutual consent (resulting for example in listing on the PCA website) or through release of information by one party (resulting for example in publication of the arbitrators' names in the specialized press, such as *Global Arbitration Review* or *Investment Arbitration Reporter*).

[9] The various stages of selection of judges in adjudicatory bodies and case assignment methods are presented in detail in the CIDS Supplemental Report, available at http://www.uncitral.org/pdf/english/workinggroups/wg_3/CIDS_Supplemental_Report.pdf.

some cases, a State may appoint a single candidate, or member States as a group may put forward a limited number of candidates, and the candidates as a whole then undergo an election process. For example, in the case of the International Court of Justice (ICJ), the General Assembly and Security Council make the appointments (fifteen judges in total), and in the case of the European Court of Human Rights (ECHR), the Parliamentary Assembly of the Council of Europe elects one of three candidates for each seat (with 41 judges in total). The nomination process involves formal and informal meetings between candidates and permanent representatives of member States.

17. The Iran-United States Claims Tribunal broadly follows the UNCITRAL Arbitration Rules,[10] but has modified the appointment process as follows. Each of the Islamic Republic of Iran and the United States of America appoints three judges, and a list procedure is used to appoint the three remaining judges. Where the list procedure fails, or the Appointing Authority is otherwise required to appoint the judges, it is under an obligation under article 6.4 of the Tribunal Rules to "secure the appointment of an independent and impartial arbitrator".

18. The World Trade Organization (WTO) Dispute Settlement Understanding (DSU) addresses appointments to the Appellate Body of WTO.[11] It provides that consensus among WTO members is required for appointment (or re-appointment) of seven members to the body (which sits in three-member panels). There has also been a practice of automatic re-appointment, other than in cases of infirmity, performance concerns or misconduct, though lack of consensus recently has led to some seats remaining vacant.

(c) Impact of the selection process on diversity and competence

Diversity

19. The Working Group may wish to consider the impact of the appointment mechanisms on the question of diversity of appointed arbitrators in ISDS.

20. At the 35th session, there was a broad view in the Working Group that there was a limited number of individuals that were repeatedly appointed as arbitrators, and consequently that were repeatedly taking decisions, in ISDS cases. The Working Group has also noted a lack of diversity in terms of gender, geographical distribution, ethnicity and age (A/CN.9/935, para. 70).

21. In addition, the Working Group has noted the following potential impacts of a lack of diversity in arbitrator appointment: a lack of arbitrators that understand the policy considerations in developing countries; possible negative impacts on correctness of decisions made; concerns at perceptions of a lack of impartiality and independence on the part of arbitrators (A/CN.9/935, para. 70).

[10] The Tribunal was established following the Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the settlement of claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 1 Iran-United States C.T.R. at 9-12, January 19, 1981. Article III Paragraph 2 of the Claims Settlement Declaration states that "2. Members of the Tribunal shall be appointed and the Tribunal shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the Parties or by the Tribunal to ensure that this Agreement can be carried out. The UNCITRAL rules for appointing members of three-member tribunals shall apply mutatis mutandis to the appointment of the Tribunal."

[11] Article 17.2.

22. The Working Group may also wish to consider whether diversity is a desirable quality in itself.[12] Respondents to a recent survey indicated that they had lost appointments as arbitrators because of diversity factors.[13]

23. The Working Group has also noted that repeated appointments might raise problems of arbitrator availability and increased costs and duration of proceedings, and that addressing diversity might contribute to resolving concerns about conflicts of interest (A/CN.9/935, para. 71).

24. Regarding gender diversity, the proportion of female arbitrators in investment treaty tribunals has been regularly surveyed in a variety of publications, though the data are not all fully comparable. In broad terms, a detailed study in 2006 of the then 102 publicly-available awards concluded that 5 out of 145 arbitrators were women (approximately 3 per cent).[14] As of 1 March 2012, based on the 254 "concluded cases" from 1972-2012 published on the ICSID website, it was concluded that 43 out of 745 arbitrators were women (5.63 per cent). A similar analysis by the SCC in 2015 found that 39 out of 279 appointments were women.[15] By comparison, a 2011 analysis for institutional appointments in international arbitration more generally (ISDS and international commercial arbitration) found that an estimated 6 per cent of arbitrators were women, increasing to 17 per cent by 2016.[16] However, it has also been suggested that in terms of the number of appointments as international arbitrators, there is no significant difference in the number of appointments women and men obtained. Various surveys also indicate that arbitral institutions are much more willing to appoint female arbitrators than the parties are.

25. International courts and tribunals have also received criticism for a lack of female judges. While the statutes of the ICJ and ITLOS do not refer to gender diversity, the more recent ICC Statute, in contrast, requires the States Parties to take into account "a fair representation of female and male judges".[17] Commentators report higher gender parity in the ICC, and in criminal and human rights courts more generally,[18] than in other bodies. As at the time of writing, there is a greater representation of female judges at the ICC (7/18) than on either ITLOS (3/21) or the ICJ (3/15).

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[12] In a recent survey, 50 per cent of respondents thought that it was desirable to have gender balance on arbitral tribunals, but 41 per cent thought that "it makes no difference". Responses on ethnicity and national background followed a similar pattern. Eighty per cent and 64 per cent, respectively, said too many arbitrators were white or from Western Europe and North America, but only 54 per cent responded that ethnic balance on a tribunal was desirable, with 31 per cent saying that "it makes no difference". See the BLP Interna..onal Arbitration Survey, 2016, available at http://www.blplaw.com/media/download/BLP-_Diversity_on_Arbitral_Tribunals_-_Survey_Report.pdf.

[13] Six per cent of respondents believed that they had lost appointments as a result of their ethnicity, 23 per cent thought they had lost appointments as a result of their gender, 28 per cent of respondents believed that they had lost appointments because they were considered too young, 84 per cent thought too many male arbitrators, 64 per cent thought too many arbitrators from Western Europe or North America, 80 per cent too many appointed arbitrators are white. BLP International Arbitration Survey, 2016, ibid.

[14] See Susan D. Franck (2009), Development and Outcomes of Investment Treaty Arbitration, Harvard International Law Journal, Vol. 50(2). It has also been concluded that the median international arbitrator was a fifty-three-year-old man who was a national of a developed state reporting ten arbitral appointments, and the median counsel was a forty-six-year-old man who was a national of a developed state and had served as counsel in fifteen arbitrations. See, further, The Diversity Challenge: Exploring the 'Invisible College' of International Arbitration, Columbia Journal of Transnational Law, Vol. 53, Page 429, 2015.

[15] See www.sccinstitute.comBabout4the4sccBnewsB2+15Bnew4sccstatistics4on4appointments4of4female4arbitrators.

[16] See Lucy Greenwood, C. Mark Baker, Is the balance getting better? An update on the issue of gender diversity in international arbitration, Arbitration International, Volume 31, Issue 3, 1 September 2015, Pages 413–423, https://doi.org/10.1093/arbint/aiv034.

[17] Art. 36(8)(a)(iii).

[18] https://scholarlycommons.pacific.edu/cgi/viewcontent.cgi?article=1259&context=mlr.

26. In terms of repeated appointments of a limited number of arbitrators, of the 372 individuals appointed to ICSID tribunals from 1972 until 2011, 37 were appointed to around 50 per cent of the cases, and approximately one third had background education from only five universities. ICSID reported that, in 289 cases from January 1972 to May 2015, in nearly half of cases (45 per cent), the tribunals were composed of all Anglo-European arbitrators.[19] Analysis of case data indicates that, in 84 per cent of the cases, two or more of the tribunal members were Anglo-European, or the sole arbitrator was Anglo-European; and 11 cases (4 per cent) were arbitrated by entirely non Anglo-European tribunals.[20] More generally, studies indicate that arbitrators from the developing world received a statistically lower number of appointments than their developed world counterparts.[21]

27. The Working Group may also wish to note that arbitral institutions report that they are taking measures to expand the pool of arbitrators (A/CN.9/935, paras. 71–72). For instance, ICSID reported in 2017 on its efforts to increase diversity as follows: "An increasingly diverse group of arbitrators, conciliators and ad hoc committee members were named in 2017: 13 per cent of these appointments involved persons who served for the first time on an ICSID tribunal or ad hoc committee; 23 per cent of the first-time appointees were nationals of low or middle income economies, and 14 per cent of the new appointees were women. Overall, 93 individuals from 33 different countries of origin were appointed to serve as arbitrators, conciliators, or ad hoc committee members in 57 ICSID cases in 2017; 14 per cent of the total number of appointments in 2017 involved women. ICSID and the Respondent/State each appointed 43.5 per cent of these female appointees, while 13 per cent of female appointments were made jointly by the parties in the underlying arbitration. No female appointments were made by the Claimant/investor individually or by the co-arbitrators."[22] Acting as appointing authority 47 times in 2017, ICSID appointed 31 individuals of 25 different nationalities. About 23 per cent of the appointments by ICSID involved nationals of low or middle-income economies, and 21 per cent of ICSID appointees were women."[23]

28. By way of comparison, the ICJ Statute does not permit two judges from the same State among the fifteen judges appointed to the Court, and the entire bench is to represent geographical diversity and the world's principal legal systems.[24]

29. The International Tribunal for the Law of the Sea (ITLOS) has the same requirements. Historically, the five permanent members of the Security Council have maintained a judge on the ICJ of their own nationality. The remaining ten judges comprise two from each of the United Nations regional groups.[25] The WTO Understanding on rules and procedures governing the settlement of disputes (DSU) provides that WTO DSU membership as a whole shall be "broadly representative of membership of the WTO".[26]

Competence, arbitrators' qualifications

30. The Working Group considered the question of arbitrators' qualifications at its 35th session (A/CN.9/935, paras. 82–88). It was recalled that party-appointment provided the parties with the right to select arbitrators on the basis of their consideration of the desired qualifications and experience, though they did not have the same control over those of the presiding arbitrator (A/CN.9/935, para. 83).

[19] Reported statistics on ICSID arbitrations.

[20] BLP International Arbitration Survey, 2016, supra.

[21] See the second study referenced in footnote 14, supra.

[22] ICSID Annual Report 2017, available at https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20AR%20EN.pdf), characteristics — see WP.146. See also http://arbitrationblog.kluwerarbitration.com/2017/12/27/on-arbitrators.

[23] ICSID Annual Report 2017, p. 35.

[24] Statute, article 9.

[25] The International Criminal Court (ICC) comprises the same regional membership.

[26] World Trade Organization (WTO), Understanding on rules and procedures governing the settlement of disputes (DSU), Article 17.3.

31. It was generally noted that the qualifications of arbitrators or decision makers in ISDS cases should include an ability to take into account relevant issues of public interest or public policy, which were usually at stake in ISDS cases. It was said that ISDS cases could require expertise in matters of both public and private international law, and also that arbitrators might be called upon to make findings on matters of domestic law (A/CN.9/935, para. 83). The issue of whether arbitrators are adequately cognizant of public interest issues also relate to technical rules of procedure and evidence. For instance, rules of evidence regarding what documents are or are not privileged, or what evidence is or is not admissible, often reflect important public policies. When arbitrators do not follow those rules in arbitral proceedings, there are policy implications and may be implications for the outcomes of proceedings.[27]

32. The ICSID Convention, in the context of the individual requirements for designation to the ICSID Panels of Arbitrators and Conciliators by the Contracting States and the Chairman of the Administrative Council,[28] requires that "[p]ersons designated to serve on the Panels shall be persons of [...] recognized competence in the fields of law, commerce, industry or finance". It further specifies that "[c]ompetence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators" (article 14(1) ICSID Convention).[29]

33. By way of comparison, a number of statutes of international courts and tribunals follow the model of Article 2 of the ICJ Statute,[30] which essentially envisages two alternative professional profiles: judges are to be elected from among individuals eligible for appointment to a "high" or "the highest" judicial offices in their respective countries. As second alternative of eligible judges, the statutes of ICJ and other international judicial bodies mention "jurisconsults", which in essence refers to scholars and academics. In some cases, statutes simply require individuals to be jurists of "recognized competence" without indication of a specific legal area.[31] So for instance at ICJ, judges need to be of recognized competence in "international law". For judges appointed on specialized courts, however, the subject-matter jurisdiction may call for more specific qualifications.[32]

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[27] See Columbia Center on Sustainable Investment, Contribution, available at http://www.uncitral.org/pdf/english/workinggroups/wg_3/UNCITRAL_WGIII_-_35th_session_-_CCSI_intervention_WP.142_Section_III.pdf.

[28] ICSID disputing parties (but not the Chairman) may appoint arbitrators from outside the Panels to arbitral tribunals. However, ICSID arbitrators appointed by the disputing parties from outside the Panels must also possess the qualities stated in Art. 14(1) of the ICSID Convention. See ICSID Convention, Arts. 40(1) and 40(2).

[29] Studies have shown that that in practice arbitrators in ISDS are generally drawn from the following fields of experience: professors in international public law, former judges (national or from the ICJ), retired diplomats and officials in foreign service or an international organization, practising lawyers who are, or were, partners in a law firm or barristers, migrating commercial arbitrators. See http://www.hrdb.com/wp-content/uploads/Qualified-Investment-Arbitrators.pdf. Also, OECD has noted: "[Arbitrators] are often lawyers, professors and former judges, who have reached very senior positions in their respective fields. According to a recent study of ICSID arbitrators, lawyers in private practice dominate the field with over 60 per cent of ICSID investment arbitrators in private practice. About one third are full-time academics. Approximately 40 per cent are specialists in public international law (including some lawyers in private practice). Government backgrounds are less represented, although a number of arbitrators have served as domestic or international judges. Few arbitrators are drawn from former investment treaty negotiators. The level of reliance in ISDS on commercial arbitrators has recently been the subject of press commentary." See Gaukrodger, D. and K. Gordon (2012), "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", OECD Working Papers on International Investment, 2012/03, OECD Publishing. http://dx.doi.org/10.1787/5k46b1r85j6f-en.

[30] Article 2 of the ICJ Statute, for instance, provides that: The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.

[31] ECtHR Statute, Art. 21(1) ("jurisconsults of recognized competence").

[32] See e.g. requirements for WTO AB members under the DSU ("demonstrated expertise in law, international trade and the subject matter of the covered agreements generally"). Judges at the Inter-American Court of Human Rights ("IACtHR"), for example, must be experts "in the field

34. The Statute of ICC envisages an Advisory Committee to review nominations to assess whether the relevant appointment criteria have been met.[33] It was put into effect in 2015 (at which time nine members were appointed for a three-year term). A similar advisory panel of experts has been set up at the ECHR.

35. The Working Group may also wish to note that appointing parties provided the following feedback on arbitrator appointments a recent survey:

- Seventy per cent of respondents stated that they have access to enough information to make an informed choice about the appointment of arbitrators
- Respondents would like to have access to arbitrators' previous awards, know more about their approach to procedural and substantive issues and have a clear picture of their availability to take on new cases
- Eighty per cent of respondents would like to be able to provide an assessment of arbitrators at the end of a dispute. Nearly 90 per cent would do so by reporting to an arbitral institution.[34]

36. It was generally agreed in the Working Group that qualifications of the decision makers were important, and should be kept in mind by the Working Group, but that that particular point would not deserve the development of a specific tool (A/CN.9/935, para. 88).

III. Desirability of reform

1. Reform objectives

37. At the 35th session of the Working Group, it was mentioned that the desirability of reform should be considered also taking into account the following matters:

- That the benefits of the current system, such as its flexibility and neutrality, should be preserved;
- That the interests of all stakeholders in ISDS should be considered and that any solutions should ensure a balance of interests of stakeholders;
- That any solutions should avoid politicization, since the de-politicization of ISDS was a primary benefit of the current system (A/CN.9/935, para. 63).

38. The Working Group may also wish to consider the desirability of taking into account potential cross benefits between reforms to the appointment mechanism on other elements of the ISDS regime, including on independence and impartiality of arbitrators, on consistency and coherence in ISDS awards and on costs and duration of ISDs proceedings as well as overall consideration of transparency.

2. Preliminary views expressed by States

39. At its 35th session, the Working Group heard some preliminary views regarding possible reforms to the appointment mechanism for arbitrators.

40. There were also calls for arbitral institutions to play a greater role in the selection of arbitrators, and to establish more transparent procedures regarding the appointment of arbitrators. It was pointed out that little information about selection methods resulted in limited accountability in the system. It was suggested that the selection criteria should be published along with explanation of the selections (A/CN.9/935, para. 66).

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of human rights", 71 while International Tribunal for the Law of the Sea (ITLOS) judges must have expertise in the law of the sea.

[33] Article 36(4)(c).

[34] See the Queen Mary University of London and White & Case 2018 International Arbitration Survey: The Evolution of International Arbitration, available at http://www.arbitration.qmul.ac.uk/research/2018/.

41. Those who considered that party appointment created systemic concerns suggested that the ISDS regime could envisage appointments/selection of decision makers not being made by the parties but by an independent body. From this perspective, it was said that without the creation of a body with permanent judges, it would be unlikely that the identified concerns could be solved. In that context, it was mentioned that mechanisms used in other international courts and bodies such as the WTO Dispute Settlement Body could be considered (A/CN.9/935, para. 67).

42. In order to address the question of lack of diversity in ISDS, a suggestion was made to provide training to expand the pool of potential arbitrators and consider a roster system or systemic solution at a future time (A/CN.9/935, para. 74).

F. Other questions for consideration

43. The Working Group may wish to note that the questions below are also discussed in document A/CN.9/WG.III/WP.149, which provides a general framework for considering the desirability of reforms. The Working Group may also wish to take additional issues into consideration.

44. The Working Group may wish to consider the appointment mechanism, which has been designed to ensure flexibility and respect for party autonomy, but which has attracted criticism that arbitrators thus appointed lack legitimacy when addressing public interest issues. In this regard, the Working Group may wish to consider the issue of arbitrator remuneration. The Working Group may further wish to consider the mechanism in the context of its equivalent in other systems as discussed above.

45. The Working Group may also wish to consider the impact of the appointment mechanism on the expected role of arbitrators. In terms of their duties, public judges often are bound by rules that require them to dismiss cases pending elsewhere, or to dismiss cases for which relief has already been sought in other proceedings. As has been highlighted in discussions of parallel proceedings, however, tribunals have in some cases seemed to view themselves as self-contained entities, handling the case before them and not feeling bound to consider what is happening or has happened in parallel proceedings, nor bound to consider the systemic issues that such parallel proceedings raise.

46. The Working Group may additionally wish to consider the questions of transparency in the appointment processes and the impact of the appointment mechanisms on the diversity of arbitrators appointed in ISDS cases.

47. A further question for consideration would concern the authority of arbitrators to consider certain issues of public interest, impacts of decisions on non-parties, questions regarding the applicable standard of review, and whether and to what extent tribunals can scrutinize decisions of fact or law made at the domestic level. This matter concerns the inherent and implied powers of arbitral tribunals.

48. The Working Group may wish to consider whether diversity on adjudicatory bodies is necessary in its own right to enhance the legitimacy of a dispute settlement system in the public perception. In the current decentralized ad hoc framework, those in charge of selecting arbitrators are subject to little pressure to diversify appointments. This feature, coupled with the lack of transparency of the appointment process, entails that efforts to advance diversity depend exclusively on the goodwill and self-regulation of the actors involved in the arbitral process. However, the Working Group may also wish to consider whether a move towards a more centralized process of selecting decision makers will necessarily result in greater diversity (or, alternatively, whether it could result in less diversity among decision makers). From this perspective, the Working Group may wish to consider the benefits of formal incorporation of diversity considerations into the selection criteria.